(18)

No. 95-1340-CFX Title: Hughes Aircraft Company, Petitioner
v.
United States, ex rel. William J. Schumer

Docketed: February 21, 1996 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Feb 15 1996	Petition for writ of certiorari filed. (Response due April 21, 1996)
	Mar 5 1996	Order extending time to file response to petition until April 21, 1996.
	Apr 22 1996	Brief of respondent William J. Schumer in opposition filed.
	Apr 22 1996	Brief amici curiae of Electronic Industries Association, et al. filed.
	Apr 22 1996	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
	May 2 1996	Reply brief of petitioner filed.
	May 8 1996	DISTRIBUTED. May 24, 1996
	May 28 1996	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
	Sep 20 1996	Brief amicus curiae of United States filed.
	Sep 25 1996	REDISTRIBUTED. October 11, 1996
	Sep 25 1996	Supplemental brief of petitioner Hughes Aircraft Company filed.
	Oct 15 1996	Petition GRANTED. limited to Questions 1 and 2 presented by the petition. SET FOR ARGUMENT February 25, 1997. **********
	Nov 27 1996	Joint appendix filed.
	Nov 27 1996	Brief of petitioner Hughes Aircraft Company filed.
	Nov 27 1996	Brief amicus curiae of Aerospace Industries Association of America, Inc. filed.
	Nov 27 1996	Brief amicus curiae of Washington Legal Foundation filed.
	Nov 27 1996	Brief amicus curiae of FMC Corporation filed.
	Nov 27 1996	Brief amicus curiae of Northrop Grumman Corporation filed.
	Nov 29 1996	Brief amici curiae of Association of American Medical Colleges, et al. filed.
	Nov 29 1996	Brief amicus curiae of Lockheed Martin Corporation filed.
	Nov 29 1996	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
	Dec 13 1996	Order extending time to file brief of respondent on the merits until January 3, 1997.
	Dec 31 1996	Brief amicus curiae of United States filed.
	Jan 3 1997	Brief of respondent William J. Schumer filed.
	Jan 3 1997	Brief amicus curiae of Taxpayers Against Fraud, The False Claims Act Legal Center filed.
	Jan 3 1997	Brief amicus curiae of National Health Law Program, Inc. filed.
	Jan 3 1997	Brief amicus curiae of Project on Government Oversight filed.
	Jan 3 1997	Brief amicus curiae of National Employment Lawyers Association filed.
	Jan 3 1997	LODGING consisting of 11 copies of three printed

2 pkp

No. 95-1340-CFX

Entry	Date	Proceedings and Orders
		documents and four press releases submitted by counsel for the amicus Taxpayers Against Fraud
	Jan 8 1997	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jan 21 1997	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Jan 23 1997	CIRCULATED.
	Feb 3 1997	Reply brief of petitioner Hughes Aircraft Company filed.
	Feb 7 1997	Record filed.
	Feb 17 1997	Record filed.
	Feb 25 1997	ARGUED.

(1)

Supreme Court, U.S.
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No. 95-951340 FEB 15 1996

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. SCHUMER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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February 15, 1996

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QUESTIONS PRESENTED

1. Whether the courts below erred in asserting jurisdiction over this action under the *qui tam* provisions of the False Claims Act.
2. Whether injury to the public fisc is an essential element of a cause of action under the False Claims Act.
3. Whether the *qui tam* provisions of the False Claims Act are unconstitutional.

PARTIES TO THE PROCEEDING

Petitioner, Hughes Aircraft Company, was appellee/cross-appellant below. Respondent, William J. Schumer (litigating on behalf of the United States of America), was appellant/cross-appellee below.

Pursuant to this Court's Rule 29.6, petitioner notes that it is a wholly-owned subsidiary of HE Holdings, Inc., which is in turn a wholly-owned subsidiary of Hughes Electronics Corporation ("HEC"). HEC, in turn, is a wholly-owned subsidiary of General Motors Corporation, which has issued various classes of shares to the public. The earnings of HEC are used to calculate the earnings per share of General Motors Class H common stock (New York Stock Exchange: GMH).

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IN THE

Supreme Court of the United States

October Term, 1995

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. SCHUMER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

Hughes Aircraft Company respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 63 F.3d 1512 (1995) and is reprinted in the Appendix ("App.") at 1a-31a.

The District Court's unpublished order denying Hughes' motions to dismiss is reprinted at App. 34a-35a. The District Court's unpublished order granting summary judgment and its findings of fact and conclusions of law are reprinted at App. 36a-64a.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 22, 1995. Hughes filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on November 17, 1995. App. at 32a-33a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

The jurisdictional bar of the False Claims Act, as amended in 1986, provides in pertinent part:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media unless . . . the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A).

STATEMENT OF THE CASE

A. The RDP Development Project

In October 1982, petitioner Hughes Aircraft Co. entered into a subcontract with the Northrop Corporation to develop a radar system for the B-2 aircraft that Northrop was then building for the United States Air Force. App. at 42a-43a. Several months later, Hughes entered into a subcontract with the McDonnell Douglas Corporation to develop an upgraded radar system for the F-15 aircraft that McDonnell Douglas was also building for the Air Force. *Id.* at 43a-44a.

With the knowledge and encouragement of Air Force officials, Hughes set out to develop a common radar component (the Radar Data Processor or RDP) for use in both the B-2 and F-15 aircraft. *Id.* at 44a-46a. To allocate properly the cost of the RDP component between the projects, Hughes program managers on December 14, 1982 entered into a "Commonality

Agreement." *Id.* at 46a. Such agreements, used by Hughes since 1978, are internal memoranda specifying the cost allocation of common parts among multiple projects. *Id.* at 38a-39a. The RDP Commonality Agreement was subsequently re-executed on June 24, 1983 without substantive change. *Id.* at 48a.

Hughes notified both the Air Force and Northrop of the Commonality Agreements. *Id.* at 47a-48a, 56a. On January 2, 1984, Hughes filed with the Air Force a revised Cost Accounting Standards ("CAS") disclosure statement describing the commonality accounting methods established in the Agreements. *Id.* at 56a. Hughes completed most of the RDP design by the summer of 1984, and began producing the hardware in the fall of that year. *Id.* at 49a.

B. The Government Audits

When, in the mid-1980s, the B-2 program experienced cost overruns, Northrop requested a government audit of Hughes' accounting methods. *Id.* at 3a. Accordingly, the Government launched an investigation into Hughes' allocation of the RDP costs between the B-2 and F-15 projects.

During the course of the government investigation, allegations of improper accounting were widely discussed among Hughes, Northrop, and government personnel. A series of government audit reports prepared between 1986 and 1988 concluded that Hughes had inappropriately charged to the B-2 program expenditures that should have been charged to the F-15 program. *Id.* at 3a. As a result, the Government withheld approximately $15.4 million in payments under the B-2 subcontract. *Id.*

After an exhaustive investigation, however, the Government ultimately concluded that Hughes had complied with the applicable cost-reimbursement regulations, and that the RDP Commonality Agreements had actually *saved* the Government money. App. at 65a-68a; *see also id.* at 4a. Accordingly, the

Government withdrew its earlier finding of noncompliance and paid Hughes the $15.4 million previously withheld on the B-2 project. *Id.* at 4a.

C. The Schumer Complaint

In January 1989, respondent William J. Schumer, then employed by Hughes as an Assistant Division Contracts Manager, filed this action under the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. That Act authorizes a private individual under certain circumstances to bring a suit on behalf of the United States against any party who "knowingly presents . . . a false or fraudulent claim" to the United States Government. 31 U.S.C. § 3729(a).

Schumer's complaint alleged that Hughes had violated the FCA by mischarging costs, pursuant to the Commonality Agreements, from the fixed-price F-15 contract to the cost-reimbursement B-2 contract. The complaint further alleged that, as a result of the Commonality Agreements, Hughes had overcharged the U.S. Government by $40 million. The complaint sought treble damages of $120 million. (Schumer subsequently amended the complaint to allege an overcharge of $50 million and to request treble damages of $150 million.) Under the FCA, Schumer would be entitled to a maximum of 30% and a minimum of 25% of any sums recovered, plus attorneys' fees and costs. *See* 31 U.S.C. § 3730(d)(2).

Although the United States Government has the right to intervene in and conduct the prosecution of a *qui tam* action, *see* 31 U.S.C. § 3730(b)(2), it declined to do so here.

D. The District Court Proceedings

Hughes moved to dismiss the action on three grounds. *First*, Hughes argued that the District Court lacked subject-matter jurisdiction under the FCA because, at the time of the wrongdoing alleged, the statute barred actions (like this one) "based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982).

Second, Hughes argued that the District Court lacked subject-matter jurisdiction because, even as amended in 1986, the FCA barred actions (like this one) "based on the public disclosure of allegations or transactions," where (as here) the *qui tam* relator was not the "original source" of that information. 31 U.S.C. § 3730 (e)(4)(A). *Third*, Hughes argued that the *qui tam* provisions of the FCA, both before and after the 1986 amendments, were unconstitutional. The District Court (Pfaelzer, J., C.D. Cal.) summarily denied the motions in November 1990. App. at 34a-35a.

Hughes subsequently moved for summary judgment on the merits on all claims. On May 20, 1992, the District Court granted the motion. App. at 36a-37a. Based on extensive findings of fact, the Court concluded that "Schumer has not shown that Hughes violated the False Claims Act." App. at 64a. Schumer appealed on the merits, and Hughes cross-appealed on the jurisdictional and constitutional issues.

E. The Ninth Circuit Proceedings

The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. App. at 1a-31a. The Court first affirmed the District Court's assertion of jurisdiction under the FCA. As an initial matter, the Court of Appeals held that the 1986 amendments relaxing the FCA's jurisdictional bar applied retroactively to the pre-1986 conduct at issue. *Id.* at 5a-7a. The Court then proceeded to interpret the amended jurisdictional bar narrowly, holding as a matter of law that no "public disclosure" occurs (1) when the Government discloses allegations of wrongdoing to a contractor's innocent employees, *id.* at 8a-11a, or (2) when government information is available to the public under the Freedom of Information Act, *id.* at 11a-14a. Finally, based on prior circuit precedent, the Court held that the *qui tam* provisions of the FCA were constitutional. *Id.* at 14a.

Turning next to the merits, the Ninth Circuit held that—*notwithstanding the Government's determination that Hughes' commonality accounting methods complied with government regulations and had actually saved the Government money*—Schumer had presented "genuine issues of material fact" under the FCA by challenging (1) the adequacy of Hughes' disclosure of those methods to Northrop, *id.* at 19a-22a, and (2) the timeliness of its disclosure to the Government, *id.* at 22a-26a. While acknowledging that Schumer had not even presented the latter claim in his complaint, the Court held that, as a matter of law, claims raised in a brief in opposition to summary judgment must be treated as a *de facto* amendment to a complaint. *Id.* at 22a-23a.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DIVIDED IN INTERPRETING AND APPLYING THE 1986 AMENDMENTS TO THE JURISDICTIONAL BAR OF THE FALSE CLAIMS ACT.

Congress amended the *qui tam* provisions of the False Claims Act in 1986 to "'encourage more private enforcement suits'" alleging fraud against the United States Government. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991) (quoting S. Rep. No. 345, 99th Cong., 2d Sess. 23-24). The 1986 amendments, among other things, relaxed the statute's jurisdictional bar. As a result, the number of such actions has skyrocketed in recent years. According to the Department of Justice, some 1,100 FCA *qui tam* suits have been filed in the decade since the 1986 amendments—as opposed to some 20 suits in the previous decade. *See* D.O.J. News Release (October 18, 1995) (reported at 1995 WL 614572).

The 1986 FCA amendments sparked not only an explosion of *qui tam* lawsuits, but also judicial conflict and confusion. In particular, the courts of appeals are divided on a host of issues involving the interpretation and application of the amended jurisdictional bar. This case squarely presents three of those circuit splits. Before addressing those splits, however, it is helpful to understand the background of the 1986 amendments.

The FCA was originally enacted in 1863 to assist the Government in ferreting out fraud by Civil War contractors. *See, e.g., United States v. McNinch*, 356 U.S. 595, 599 (1958); *Stinson*, 944 F.2d at 1153. The 1863 Act contained a broad *qui tam* provision allowing "any person" to prosecute a claim on behalf of the United States "against any person who knowingly submitted a false claim to the Government." *Id.* A successful *qui tam* relator was entitled to half of any damages recovered. *Id.*

Notwithstanding their broad scope, the *qui tam* provisions of the 1863 Act were little invoked for almost a century. In 1943, however, this Court construed the FCA to allow a *qui tam* action based entirely on information copied from a criminal indictment. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546 (1943). Taking a dim view of such "parasitic" actions, Congress immediately amended the Act to bar jurisdiction over actions "based on evidence or information the government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982)

As so amended, the Act barred not only "parasitic" actions like *Marcus*, but also actions brought by "whistleblowers" who had themselves alerted the Government to fraud. *See, e.g., United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1102-06 (7th Cir. 1984). In an effort to encourage *qui tam* actions, Congress in 1986 relaxed the jurisdictional bar. As amended, the FCA allows *qui tam* actions unless "based upon the *public disclosure* of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media." 31 U.S.C. § 3730(e)(4)(A) (emphasis added).[1]

The 1986 amendments to the FCA's jurisdictional bar thus sought to strike a balance between "the almost unrestrained permissiveness represented by the *Marcus* decision, and the restrictiveness of the post-1943 cases, which precluded suit even by the original sources." *Stinson*, 944 F.2d at 1154 (citations omitted). The amended jurisdictional bar, accordingly, continued to preclude "parasitic" suits, while seeking to

[1] The 1986 amendments also sought to encourage *qui tam* actions by extending the statute of limitations, *see* 31 U.S.C. § 3731, reducing the *scienter* requirement, *id.* at § 3729(b), lowering the burden of proof, *id.* at § 3731(c), increasing the statutory penalties, *id.* at § 3729(a), and increasing the bounty available to *qui tam* relators, *id.* at §§ 3730(d)(1) & (2).

encourage "whistleblower" suits by those who exposed fraud against the Government. *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 319, 321-22 (2d Cir. 1992); *see also United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649, 651 (D.C. Cir. 1994); *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1511 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2579 (1995).

A. The Courts of Appeals Are Divided on the Retroactive Effect of the Jurisdictional Bar As Amended in 1986.

The threshold question in this case is whether the relaxed FCA jurisdictional bar as amended in 1986 applies retroactively to authorize *qui tam* actions based on alleged wrongdoing *prior* to 1986. On this question, the courts of appeals are in clear conflict.

The Ninth Circuit held below that the relaxed jurisdictional bar did indeed apply retroactively, authorizing *qui tam* actions barred at the time of the wrongdoing alleged. App. at 5a-7a. While paying lip service to the rule that statutes are presumed to apply prospectively only, the Court held that the FCA's amended jurisdictional bar fell within an "exception to that rule in the case of jurisdictional statutes." *Id.* at 6a. Retroactive application of the amended jurisdictional bar, the Court asserted, would not have a "deleterious effect" on Hughes' "substantive rights" because it "did not alter [any] underlying liability; it only altered the conditions under which a *qui tam* relator can bring an action to enforce that liability." *Id.* at 7a (internal quotation omitted).

The Sixth Circuit, in contrast, has refused to apply the FCA's relaxed jurisdictional bar to *qui tam* actions challenging conduct that preceded the 1986 FCA amendments. *See United States v. TRW, Inc.*, 4 F.3d 417, 422-23 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1370 (1994). The *TRW* Court expressly rejected the argument that those amendments "fall under [the]

narrow exception" to the general rule that statutes are presumed to apply prospectively only. *Id.* at 422-23. Retroactive application of the relaxed jurisdictional bar, the Court observed, would affect substantive rights by, among other things, "expand[ing] the circumstances under which citizens may bring false claims suits." *Id.* at 422. Accordingly, the *TRW* Court proceeded to apply the broader jurisdictional bar in effect before the 1986 amendments.[2]

The decision below not only created a split with the Sixth Circuit, but reached an incorrect result. This Court has recently reaffirmed the general rule that statutes are not to be given retroactive effect absent clear legislative intent. *See Landgraf v. USI Film Prods.*, 114 S. Ct. 1483 (1994). To be sure, that rule does not apply where a statutory change is merely procedural and does not "attac[h] new legal consequences to events completed before its enactment." *Id.* at 1499. The 1986 amendments to the FCA's jurisdictional bar, however, do not fall within that narrow exception.

Retroactive application of the amended jurisdictional bar self-evidently attaches new legal consequences to a *qui tam* defendant's past conduct. But for the 1986 amendments, this action would have been readily dismissed—only the Government could have sued Hughes, but it declined to do so or even to intervene here. Retroactive application of the relaxed jurisdictional bar, thus, deprives Hughes of an absolute defense to this action, and opens the door to potential multimillion-dollar liability. Such retroactive liability is particularly inappropriate under the FCA, a statute at least quasi-criminal in nature. *See, e.g., United States ex rel. Weinberger v.*

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[2] Although *TRW* was decided before this Court's recent decision in *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483 (1994), the Sixth Circuit applied the traditional retroactivity analysis reaffirmed in that decision. Indeed, this Court denied *certiorari* in *TRW* less than a month before announcing its decision in *Landgraf*. *See* 114 S. Ct. 1370 (1994).

Equifax, Inc., 557 F.2d 456, 460 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *cf. United States v. Halper*, 490 U.S. 435, 449-50 (1989) (applying double jeopardy analysis to FCA penalties).

B. The Courts of Appeals Are Divided on the Meaning of "Public Disclosure" As Used in the Amended Jurisdictional Bar.

After holding that the amended jurisdictional bar applies retroactively, the Ninth Circuit held that the bar did not preclude this action because there had been no "public disclosure" of the allegations involved. The Ninth Circuit's narrow interpretation of "public disclosure" creates two distinct circuit splits over the meaning of that key statutory term.

1. The Courts of Appeals Are Divided on Whether Government Disclosure of Allegations of Misconduct To a Contractor's Innocent Employees Constitutes "Public Disclosure."

The Ninth Circuit first held as a matter of law that government disclosure of an alleged fraud to "innocent employees" of a government contractor (*i.e.*, those not involved in the alleged fraud) was not a "public disclosure" within the meaning of the amended jurisdictional bar. App. at 8a-11a. The Court thus rejected Hughes' argument that this action should be dismissed because it is based on information that Schumer obtained from the Government's mid-1980s investigation and audits of Hughes' RDP Commonality Agreements.[3]

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[3] Because the Ninth Circuit concluded as a matter of law that no "public disclosure" had occurred in this case, it did not reach the question whether this action is "based upon" any such disclosure. *See* App. at 14a. The Courts of Appeals are also divided on the meaning of the term "based upon." *Compare United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir.) (action "based upon" public disclosure only

(continued...)

The Ninth Circuit explicitly based its narrow interpretation of "public disclosure" on the assumption that employees of government contractors are unlikely to bring *qui tam* actions because of their interest in retaining their jobs. "Unlike others who come across information related to fraud, an innocent employee who comes forward with allegations of fraud by her employer knows that her job may be in jeopardy." App. at 9a (internal quotation omitted). "Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure." *Id.*

The Ninth Circuit expressly rejected a Second Circuit decision holding that disclosure of alleged misconduct to a contractor's innocent employees during the course of a government investigation *is* "public disclosure" within the meaning of the amended jurisdictional bar. App. at 8a-11a (rejecting *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992)). The Second Circuit, in contrast to the Ninth, refused to interpret "public disclosure" to require disclosure to the public "at large." *Doe*, 960 F.2d at 323. Rather, the *Doe* Court held, "public disclosure" takes place whenever an alleged fraud is "actually divulged to strangers to the fraud," including a contractor's "innocent employees." *Id.* at 322. "Once allegations of fraud are revealed to members of the public with no prior knowledge thereof, the government can no longer throw

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[3] (...continued)
when *actually* derived from disclosure), *cert. denied*, 115 S. Ct. 316 (1994), *with United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1158 (2d Cir.) (action "based upon" public disclosure when involving same subject matter, regardless of whether *actually* derived from disclosure), *cert. denied*, 113 S. Ct. 2962 (1993); *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992) (same), *cert. denied*, 507 U.S. 951 (1993).

a cloak of secrecy around the allegations; they are irretrievably released into the public domain." *Id.* at 323.

Hewing to its avowedly policy-based interpretation of "public disclosure," the Ninth Circuit dismissed the Second Circuit's contrary interpretation as "unrealistic." App. at 9a. To construe disclosure to innocent employees as "public disclosure," the Ninth Circuit asserted, would "drastically curtai[l] the ability of insiders to bring suit once the government becomes involved in the matter." *Id.* at 10a. That result, the Ninth Circuit theorized, would be "contrary to the intent of the statute." *Id.* at 11a. "Thus, we reject the *Doe* court's definition of 'public disclosure,' which forecloses many insiders from bringing *qui tam* actions." *Id.*, *see also id.* at 9a ("We decline to adopt the rule of *Doe* for application in this circuit.")

The Ninth Circuit's holding not only conflicts squarely with *Doe*, but contravenes the plain language of the statute. The term "public disclosure" on its face does not require disclosure to the *general* public. To the contrary, the statute contemplates "public disclosure" through means often unknown and incomprehensible to the general public, including (as involved here) government "audit[s]" and "investigation[s]." 31 U.S.C. § 3730(e)(4)(A).

The Ninth Circuit's policy arguments are also flimsy at best. The 1986 amendments to the FCA did not seek to encourage *any and all qui tam* actions, but rather actions by "whistleblowers" who contribute valuable information to the Government. The Ninth Circuit's narrow interpretation of "public disclosure" is an open invitation to "parasitic" lawsuits by employees (like Schumer) who learn of an alleged fraud through a government investigation of their employer. Once the Government has launched an investigation into alleged wrongdoing, by definition it is "on the trail of the alleged fraud without [the relator's] assistance." *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995). Under these circumstances, a *qui tam* action serves no useful purpose.

Thus, as a matter of policy as well as statutory text, innocent employees who learn of an alleged fraud through a government investigation should be precluded from filing a *qui tam* action unless they qualify as an "original source" of that information.[4]

Indeed, if innocent employees are free to file a *qui tam* action based on information learned from a government investigation of their employer, such actions can be expected as a matter of routine whenever the Government audits a contractor. The Ninth Circuit shrugged off this concern by observing that "any such effect would be limited to a single lawsuit in each instance, since the first filing would constitute public disclosure sufficient to bar other claims based upon the audit." App. at 11a. That observation (even if correct) offers scant reassurance to government contractors: it simply encourages a race to the courthouse among opportunistic employees hoping to capitalize on adverse government findings.

Moreover, the Ninth Circuit's core assumption—that innocent employees are unlikely to bring *qui tam* actions for fear of retaliation—is not only speculative but fanciful. Among the 1986 amendments to the FCA is a provision guaranteeing full protection to employees who file *qui tam* actions. *See* 31 U.S.C. § 3730(h). Congress, unlike the panel below, understood full well that most *qui tam* actions (like this one) are filed not by members of the public at large, but by an accused contractor's own employees. Indeed, the Ninth Circuit *en banc* recently observed that "the paradigm *qui tam* case is one in which an insider at a private company brings an action against his own employer." *United States ex rel. Fine v. Chevron*, 72 F.3d 740, 742 (9th Cir. 1995) *(en banc)*.[5]

Finally, even if the correct interpretation of "public disclosure" presented a close question, this Court should adopt the interpretation that avoids the need to address the serious constitutional questions discussed below in Part III. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 343 (1974); *Schneider v. Smith*, 390 U.S. 17, 26 & n.5 (1968); *United States v. Rumely*, 345 U.S. 41, 45 (1953); *Crowell v. Benson*, 285 U.S. 22, 62 & n.30 (1932). To the extent this action and others are jurisdictionally barred as based on "public disclosure," this Court and others need not address those thorny questions.

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[4] Because the Ninth Circuit concluded as a matter of law that no "public disclosure" had occurred in this case, it did not reach the question whether Schumer was an "original source" of the Government's information. App. at 14a. The Courts of Appeals are also divided on the interpretation of "original source." *Compare Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992) ("original source" may bring *qui tam* action notwithstanding "public disclosure" only where he was actual source of disclosure); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16-17 (2d Cir. 1990) (same), *with Siller*, 21 F.3d at 1351 ("original source" may bring *qui tam* action notwithstanding "public disclosure" *regardless* of whether he was actual source of disclosure); *United States ex rel. Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 568 n.13 (11th Cir. 1994) *(per curiam)* (same).

[5] Even if the panel below were correct that, for fear of retaliation, innocent employees are unlikely to file *qui tam* actions against their employers, in this case the government investigation and audits were disclosed not only to *Hughes'* innocent employees, but also to *Northrop's*. The Ninth Circuit dismissed that point by asserting that all government contractors and their employees "operate within a closed loop of secrecy." App. at 9a. That assertion is baseless. Even if innocent employees were chilled from blowing the whistle on their *own* employers, there is no reason to suppose that they would be chilled from blowing the whistle on *other* employers. To the contrary, prime contractors have a strong financial incentive to ensure that their subcontractors do not overcharge. Indeed, in this very case, it was Northrop employees who launched the government investigation of Hughes.

2. The Courts of Appeals Are Divided on Whether the Availability of Government Documents To the Public Constitutes "Public Disclosure" Regardless of Whether a Member of the Public Has Actually Obtained Those Documents.

After holding as a matter of law that no "public disclosure" occurs when innocent employees are informed of a government investigation, the Ninth Circuit next rejected Hughes' alternative argument that documents are "publicly disclosed" when available under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 . The Court did not dispute the proposition that documents are "publicly disclosed" when they are *available* to the public. Rather, the Court drew a distinction between "actual" and "potential" availability, holding as a matter of law that no "public disclosure" under FOIA occurs unless and until "a member of the public requests the information *and receives it* from the government." App. at 13a (emphasis in original). "Only then is the information *actually*, rather than *theoretically* or *potentially*, available to the public." *Id.* (emphasis in original). Thus, although the government audit reports describing Hughes' alleged misallocation of RDP costs were available to the public under FOIA—and were *in fact* obtained by Schumer pursuant to a FOIA request—the Ninth Circuit held that the reports were not "publicly disclosed" until Schumer *actually* obtained them, after filing this action. *Id.*

The Ninth Circuit based its reasoning on a D.C. Circuit opinion construing "public disclosure" within the meaning of the FCA jurisdictional bar by drawing the same distinction between "actually" and "potentially" available information. *See* App. at 12a-13a (discussing *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994)). The *Quinn* Court, like the panel below, held as a matter of law that "public disclosure" occurs only when documents are "*actually* made public" as opposed to when

documents are "only *theoretically* available upon the public's request." *Quinn*, 14 F.3d at 652 (emphasis in original).

That approach conflicts with cases from the Second and Third Circuits holding that documents are "publicly disclosed" *whenever* they are available to the public, regardless of whether a member of the public *actually* requests and receives the documents. *See United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1158 (2d Cir.), *cert. denied*, 113 S. Ct. 2962 (1993); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1159 (3d Cir. 1991). Both *Kreindler* and *Stinson* involved *qui tam* actions brought by law firms based on information regarding alleged frauds on the Government obtained during civil discovery on behalf of clients. Both the Second and Third Circuits ordered the actions dismissed on the ground that the information had been "publicly disclosed" because it was "potentially accessible" to any member of the public who consulted court files. *Kreindler*, 985 F.2d at 1158; *Stinson*, 944 F.2d at 1158; *see also Doe*, 960 F.2d at 322 ("*Potential* accessibility by those not a party to the fraud was the touchstone of public disclosure" in *Stinson*) (emphasis added).

The Ninth Circuit's insistence that documents "potentially accessible" to the public are not "publicly disclosed" not only deepens a circuit split, but rests on shaky logical foundations. The asserted distinction between "actual" and "potential" availability is contrived: material that is available to the public is "publicly disclosed" within the meaning of the FCA both before and after a member of the public actually obtains it.

Indeed, the most natural reading of the statute is that information revealed "in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation," like information "from the news media" is *per se* "publicly disclosed." 31 U.S.C. § 3730(e)(4). Under that commonsense interpretation,

private *qui tam* suits are barred once the Government has taken affirmative steps to redress the alleged fraud, or once it has been disseminated to the general public by the media.

II. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER INJURY TO THE PUBLIC FISC IS AN ESSENTIAL ELEMENT OF A CAUSE OF ACTION UNDER THE FALSE CLAIMS ACT.

After setting forth the expansive interpretation of *qui tam* jurisdiction described above, the Ninth Circuit proceeded to set forth a similarly expansive interpretation of substantive liability under the False Claims Act. Notwithstanding the Government's determination that Hughes' commonality accounting methods complied with applicable cost-accounting regulations and had actually saved the Government money, *see* App. at 65a-68a, the Court held that Schumer had presented "genuine issues of material fact" under the FCA regarding Hughes' disclosure of those accounting methods to Northrop and to the Government. *Id.* at 19a-26a. That holding fundamentally misconstrues the False Claims Act, and conflicts with decisions from other courts of appeals.

Before addressing that holding, however, it is first necessary to address the Ninth Circuit's preliminary procedural ruling that, as a matter of law, new claims raised in Schumer's brief in opposition to summary judgment must be treated as a *de facto* amendment of his complaint. *Id.* at 22a-23a. That ruling ignores fundamental principles of civil procedure, and also conflicts with decisions from other courts of appeals.

A. The Courts of Appeals Are Divided on Whether Claims Raised in a Brief in Opposition to Summary Judgment Must Be Construed as *De Facto* Amendments to a Complaint.

The Ninth Circuit freely acknowledged that Schumer failed to allege in his complaint his current claims that Hughes violated the FCA by failing to comply with the Government's

Cost Accounting Standards ("CAS"). *See* App. at 22a. The Court, however, held that Schumer had *de facto* amended his complaint by raising these claims in his brief in opposition to Hughes' motion for summary judgment. "[W]hen a party raises a claim in materials filed in opposition to a motion for summary judgment, the district court should treat the filing as a request to amend the pleadings and should consider whether the evidence presented creates a triable issue of material fact." *Id.* at 22a-23a (citing *Apache Survival Coalition v. United States*, 21 F.3d 895, 910-11 (9th Cir. 1994); *Johnson v. Mateer*, 625 F.2d 240, 242 (9th Cir. 1980); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1052-54 & n.68 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982)).

That ruling squarely conflicts with holdings from the Seventh Circuit. *See Pritchard v. Rainfair, Inc.*, 945 F.2d 185, 191 (7th Cir. 1991) (plaintiff's "attempt to amend [his complaint] by briefs in opposition to summary judgment and on appeal is both untimely and improper"); *see also Thomason v. Nachtrieb*, 888 F.2d 1202, 1205 (7th Cir. 1989) (noting "basic principle" that "complaint may not be amended by the briefs in opposition to a motion to dismiss"); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) ("It is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss."), *cert. denied*, 470 U.S. 1054 (1985); *cf. Northington v. McGoff*, No. 91-1252, 1992 WL 149918, at *4 (10th Cir. June 25, 1992) (citing *Pritchard* with approval for proposition that "complaint may not be amended by brief in opposition to motion for summary judgment").

The Ninth Circuit's rule goes well beyond the traditional presumption in favor of liberal amendment of complaints. Indeed, the rule subverts the core purpose of a complaint: to put the defendant and the court on notice of the plaintiff's claims. *See, e.g., Pritchard*, 945 F.2d at 191 ("The defendant and the

court should not be left to speculate as to what theory the plaintiff may be pursuing."). The Ninth Circuit's rule of *"de facto"* amendment also subverts proper summary judgment procedures by transforming complaints into constantly moving targets. The rule is particularly inappropriate in cases (like this one) involving allegations of fraud. *See, e.g., Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476-77 (2d Cir. 1995) (FCA complaints must be pleaded "with particularity" pursuant to Fed. R. Civ. P. 9(b)).[6]

B. The Courts of Appeals Are Divided on Whether Injury To the Public Fisc is an Essential Element of a Cause of Action Under the False Claims Act.

On the merits, the Ninth Circuit held that Schumer had presented "genuine issues of material fact" under the FCA relating to (1) the adequacy of Hughes' disclosure of its commonality accounting methods to Northrop, *see* App. at 19a-20a, and (2) the timeliness of Hughes' disclosure of those accounting methods to the Government, *see id.* at 25a-26a. While acknowledging the Government's determination that Hughes' commonality accounting methods "had actually saved the government money," *id.* at 4a, the Ninth Circuit held that Schumer's challenges to Hughes' disclosure of those accounting methods *per se* stated a cause of action under the False Claims Act. "[T]he lack of a determination of *actual harm* from the CAS violation does not preclude a claim under the FCA." *Id.* at 25a (emphasis added).[7]

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[6] The Ninth Circuit's rule also leads to the anomalous result that a district court has discretion to deny a formal motion to amend a complaint under Fed. R. Civ. P. 15, *see* App. 28a-29a, but no such discretion to deny a *"de facto"* amendment when a plaintiff raises a new claim in a brief in opposition to summary judgment.

[7] The Ninth Circuit also suggested that the alleged defects in Hughes' disclosure of its commonality accounting methods to Northrop and the Government "may" have rendered unspecified costs "unallowable" within

(continued...)

The FCA, however, is not a Code of Procedural Regularity in government contracts. The statute requires a false or fraudulent "claim" against the public fisc. A purely technical violation of government contracting standards that does not result in any such "claim" thus fails to state a cause of action under the FCA. *See, e.g., United States v. American Heart Research Found., Inc.*, 996 F.2d 7, 10 (1st Cir. 1993); *United States ex rel. Glass v. Medtronic, Inc.*, 957 F.2d 605, 607-08 (8th Cir. 1992); *United States v. Azzarelli Constr. Co.*, 647 F.2d 757, 759-62 (7th Cir. 1981). Indeed, the FCA itself characterizes "damages" as an "essential elemen[t] of the cause of action." *See* 31 U.S.C. § 3731(c).

In support of its contrary holding, the Ninth Circuit cited *Rex Trailer Co. v. United States*, 350 U.S. 148, 152 (1956), and *United States v. Kensington Hosp.*, 760 F. Supp. 1120, 1127 (E.D. Pa. 1991). *See* App. at 25a. But those cases simply recite the unremarkable proposition that the Government need not prove "actual" or "specific" damages to recover under the FCA. As the Seventh Circuit has explained, "[t]he lack of any requirement of specific evidence of *damages* does not dispense with the need to establish an *injury*." *Azzarelli*, 647 F.2d at 762

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[7] (...continued)
the meaning of a federal regulation. App. at 19a, 25a (citing 48 C.F.R. § 31.201-2(a)). That suggestion is baseless as a matter of law and fact. The Government's Contracting Officer determined that Hughes' commonality accounting methods complied with applicable regulations, and that no adjustment to the contract price should be made. *See* App. at 67a-68a. Accordingly, the Government paid Hughes the $15.4 million that had been withheld during the course of the investigation. Under black-letter government-contracts law, "a determination by a contracting officer that a cost is allowable, combined with payment of that cost, binds the Government so that no challenge to the allowability of the cost can be maintained." J. Cibinic & R. Nash, *Cost-Reimbursement Contracting* 1106 (2d ed. 1993) (citing cases). Thus, Schumer has presented no "genuine issue of material fact" regarding any "unallowable" cost, much less any "genuine issue of material fact" regarding any violation of the False Claims Act.

(emphasis added) (citing *Rex Trailer*, 350 U.S. at 152-53). *See also United States v. Halper*, 490 U.S. 435, 445 (1989) (stressing that "Government *did* sustain injury" in *Rex Trailer*) (emphasis added).

The Ninth Circuit thus erred in holding that a cause of action under the FCA does not require any showing of injury to the public fisc. To the contrary, the adequacy of Hughes' disclosure of its commonality accounting methods to Northrop and the timeliness of its disclosure to the Government are relevant under the FCA only insofar as they resulted in some false or fraudulent "claim" injuring the public fisc. Because Schumer failed to present a "genuine issue of material fact" regarding any such claim, by definition his challenges to Hughes' disclosure of its commonality accounting methods are not "material."

III. THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT ARE UNCONSTITUTIONAL.

Finally, relying on precedents from the Ninth and Second Circuits, the court below summarily rejected Hughes' contention that the *qui tam* provisions of the FCA are unconstitutional. App. at 14a (citing *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 747-59 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994), *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827, 830 (9th Cir. 1993), and *Kreindler*, 985 F.3d at 1153-55)).

That holding presents constitutional questions of the first order. Although the U.S. Code has long included *qui tam* provisions of various sorts, this Court has never addressed their constitutionality. In light of the recent explosion of *qui tam* litigation under the amended FCA, the issue is especially timely. Although no court of appeals has held *qui tam* actions unconstitutional, the issue remains unsettled. Indeed, the Office of Legal Counsel in the Department of Justice formally opined during the previous Administration that the FCA's *qui tam* provisions are "patently unconstitutional," and that "[i]n our view, this is not even a close question." Memorandum from Asst. Attorney General William P. Barr to Attorney General Dick Thornburgh (July 18, 1989), 13 Op. O.L.C. 249, 251 (1989) (reported at 1989 WL 418317). The constitutionality of *qui tam* actions, moreover, has been much debated in the academy.[8] Because resolution of the statutory issues in this case necessarily implicates these important and ripe underlying constitutional issues, *see supra* at 15, this Court should grant *certiorari* on all issues.

A. The *Qui Tam* Provisions of the False Claims Act Violate the Separation of Powers.

The *qui tam* provisions of the FCA are unconstitutional, first and foremost, because they violate the fundamental separation of powers between the Executive and Legislative Branches of the Federal Government. The core function of the Executive Branch (as its name suggests) is to execute the laws. That function, under basic separation-of-powers principles, is forbidden to the Legislative Branch. Consistent with those principles, Congress may not deputize private parties at will to execute the laws on behalf of the United States. If Congress had plenary authority to vest in private parties the core power of executing the law, the constitutional balance of power would be radically altered.

Private *qui tam* suits are a manifest encroachment on executive power. The FCA "let[s] loose a posse of *ad hoc*

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[8] *Compare, e.g.*, Caminker, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341 (1989) (endorsing constitutionality of *qui tam* actions); Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. Chi. L. Rev. 543 (1990) (same) *with* Note, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 Harv. J.L. & Pub. Pol'y 701 (1993) (challenging constitutionality of *qui tam* actions); Comment, *"Missing the Analytical Boat": The Unconstitutionality of the Qui Tam Provisions of the False Claims Act*, 27 Idaho L. Rev. 319 (1990) (same).

deputies to uncover and prosecute frauds against the government." *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992). The Attorney General plays no role in appointing *qui tam* relators, and cannot prevent a *qui tam* action from being filed. Although the Attorney General has the right to intervene in an action, *see* 31 U.S.C. § 3730(b)(2), she can neither remove the relator nor apparently dismiss the action without court approval, *see id.* § 3730(c)(2).[9]

Indeed, it is no secret that Congress amended the FCA in 1986 as a result of dissatisfaction with the Executive's vigor in enforcing the law. *See, e.g.*, S. Rep. No. 345, 99th Cong., 2d Sess. 25-26 (1986) (amendments allow *qui tam* relators to "ac[t] as a check that the Government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reason"); H.R. Rep. No. 660, 99th Cong., 2d Sess. 22-23 (1986) ("[T]he Committee is concerned that there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action."). Indeed, this case dramatically underscores the reality of *qui tam* encroachment on executive power: Schumer has continued to press this action on behalf of the United States notwithstanding the Executive's conclusion that it is unwarranted.

B. The *Qui Tam* Provisions of the False Claims Act Violate the Appointments Clause.

It follows from the foregoing general discussion of separation of powers that the *qui tam* provisions of the FCA also violate the Appointments Clause, Art. II, § 2, cl. 2. By litigating on behalf of the United States, *qui tam* relators exercise significant governmental authority and must be appointed consistent with the Appointments Clause. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 124-27, 140 (1976) *(per curiam)*. Even assuming that *qui tam* relators are "inferior Officers" (as opposed to "Officers of the United States") within the meaning of that Clause, Congress can vest their appointment only in the President, the "Courts of Law," or the "Heads of Departments." *Id.* *Qui tam* relators, of course, are appointed by no one but themselves. Congress may not, consistent with the Appointments Clause, assign execution of the laws to such self-appointed officers. *Cf. Public Citizen v. Department of Justice*, 491 U.S. 440, 485-86 (1989) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, J., concurring) (in construing Appointments Clause, "we have refused to tolerate any intrusion by the Legislative Branch" and rejected a "balancing approach").

C. The *Qui Tam* Provisions of the False Claims Act Violate the Standing Requirements of Article III.

Finally, *qui tam* actions are unconstitutional because *qui tam* relators lack the threshold "irreducible constitutional minimum" requirement necessary for Article III standing: injury-in-fact. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). *Qui tam* relators suffer no "concrete and particularized" injury: their only conceivable injury is an insufficient "generalized grievance" shared by all taxpayers. *See, e.g., United States v. Hays*, 115 S. Ct. 2431, 2435 (1995) (internal quotation omitted); *Lujan*, 504 U.S. at 573-74; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

In *Kreindler*, however, the Second Circuit held that FCA *qui tam* relators have standing because Congress gave it to them: "Congress . . . may create a legal interest and confer standing to assert it." 985 F.2d at 1153. That theory, however, ignores the settled principle that the injury-in-fact requirement of

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[9] This judicial oversight of decisions traditionally within the sole discretion of the Executive Branch raises its own separation-of-powers problems. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is . . . not to inquire how the executive, or executive officers, perform duties in which they have a discretion.").

Article III is constitutional in nature, and cannot by abrogated by legislative fiat. *See, e.g., Lujan*, 504 U.S. at 576-78 (Congress cannot confer standing on plaintiffs who lack injury in fact); *Valley Forge*, 454 U.S. at 488 n.24 (no "[c]ongressional enactment . . . can lower the threshold requirement for standing under Article III"); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("In no event . . . may Congress abrogate the Art. III minima.").

Rather than relying on *Kreindler's* "congressional authorization" theory, the Ninth Circuit in *Kelly* and *Madden* held that "the FCA effectively assigns the government's claims to *qui tam* plaintiffs . . . who then may sue based upon an injury to the federal treasury." *Kelly*, 9 F.3d at 748. This *de facto* "assignment" theory, however, is nothing but a semantic reformulation of the "congressional authorization" theory described above. Under the Ninth Circuit's expansive approach to "assignment," Congress could confer standing at will by simply purporting to "assign" claims to individuals who would otherwise lack standing. Indeed, Congress would not even have to *purport* to "assign" those claims; *Kelly* and *Madden* rely on shadowy notions of "constructive" assignment.

Finally, both *Kreindler* and *Kelly* suggested that *qui tam* relators may have standing in light of the prospective bounty. *See Kelly*, 9 F.3d at 749; *Kreindler*, 985 F.2d at 1154. This Court noted that theory of standing in *Lujan*, but expressly declined to address it. *See* 504 U.S. at 572-73. A mere desire to obtain a bounty, however, cannot reasonably be characterized as an injury-in-fact. *Cf. Diamond v. Charles*, 476 U.S. 54, 69-71 (1986); *In re Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-59 (1868); *United States v. Morris*, 23 U.S. (10 Wheat.) 246 (1825). Again, endorsement of such a theory would undermine Article III by allowing Congress to confer standing at will by creating statutory bounties.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 92-55759, 92-55857

United States of America, *ex rel.*, William J. Schumer,

Plaintiff-Appellant-Cross-Appellee,

v.

Hughes Aircraft Company,

Defendant-Appellee-Cross-Appellant.

Argued and Submitted Feb. 4, 1994
Decided Aug. 22, 1995

Before: D.W. NELSON, REINHARDT, and BRUNETTI, Circuit Judges.

D.W. NELSON, Circuit Judge:

Appellant William J. Schumer, a former manager at Hughes Aircraft Company ("Hughes"), filed suit against Hughes under the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*. Schumer asserted that Hughes had defrauded the United States government by

entering into unauthorized and illegal "commonality agreements" to allocate certain costs of projects over more than one subcontract. The district court granted summary judgment in favor of Hughes. We have jurisdiction under 28 U.S.C. § 1291. We reverse the district court's grant of summary judgment on Schumer's claims that Hughes failed to disclose properly the terms of its commonality agreements to its customer and that Hughes did not comply with the disclosure requirements of the Cost Accounting Standards. We affirm the district court's rulings on Schumer's remaining claims.

After Schumer filed this appeal, Hughes filed a cross-appeal, alleging that the 1986 amendments to the FCA do not apply retrospectively to this claim and that, alternatively, the statute's jurisdictional bar against claims based on publicly disclosed allegations applies in this case. We reject the cross-appeal on the grounds that under the 1986 jurisdictional provision, which applies retrospectively, we find subject matter jurisdiction because the allegations central to Schumer's claims were not publicly disclosed prior to the suit.

BACKGROUND

During the 1970s and into the 1980s, Hughes was under contract to develop and produce equipment and systems for use by the United States armed forces. Among its contracts were projects relating to the development of radar systems for the F-15 and F-18 fighter planes. In 1982, Hughes agreed to serve as the subcontractor for Northrop Corporation ("Northrop") to develop a radar system to meet the requirements of the new B-2 bomber program.

Hughes soon found that certain components developed for use in the B-2 radar system, such as the Analog Signal Converter and the Radar Data Processor, had utility as components for other Hughes aircraft projects that it was under

subcontract to develop, such as the F-15 Multi-Stage Improvement Program ("F-15 MSIP"). Accordingly, the Hughes program managers for these projects entered into internal "commonality agreements," by which Hughes committed to allocate the costs of development of such common components to either the B-2 or F-15 account, presumably with the consent of the general contractors of both programs and the United States Air Force. The development costs of the RDP were all charged to the F-15 program, and the costs of the ASC were charged to the B-2 program.

After the F-15 program experienced major cost overruns in the mid-1980s, Northrop requested a government audit of Hughes's accounting practices. The results of these audits raised concerns over whether Hughes had properly allocated costs between the contracts and whether Hughes had secured the consent of Northrop and the Air Force. A June 1986 audit, classified as "secret," concluded that the actual allocation under Hughes's commonality agreement did not reflect the terms of the subcontracts. Specifically, the report alleged that Hughes had inappropriately charged expenditures to the B-2 program that should have been borne by the F-15 program, with the effect that the losses to the F-15 contract were artificially reduced at the expense of the B-2 program. Subsequent audits conducted between 1986 and 1988 concluded that the commonality agreements had not been authorized and had not been reflected properly in accounting disclosure statements. As a result, the government withheld payment to Hughes of approximately $15.4 million in costs charged to the B-2 program.

Appellant William J. Schumer, a manager in the Radar Systems Group of Hughes, participated in the negotiations with Northrop that resulted in the B-2 subcontract. He contends that in 1983 his supervisor asked him to draft commonality

agreements between the B-2, F-14, and F-15 programs and instructed him not to inform the contractors of the agreements. Believing such agreements to be illegal, Schumer refused to do so. In 1987, Schumer was removed from the B-2 project.

In January 1989, Appellant filed a complaint against Hughes under the *qui tam* provisions of the FCA, which authorize a private individual to bring an action on his own behalf and on behalf of the government against a party who "knowingly presents ... a false or fraudulent claim" to the United States government. 31 U.S.C. § 3729. The government conducted a sixteen month investigation of the matter, but ultimately declined to intervene in the case. Because audits conducted in 1990 and 1991 revealed that Hughes's pooling arrangement had actually saved the government money, the government withdrew an earlier finding of noncompliance.

Schumer's amended complaint alleged that Hughes had "misbid, misallocated, and mischarged" the costs of F-14, F-15, F-18, and B-2 programs, and that the commonality agreements had been established without the knowledge of the Air Force or the contractors. After an unsuccessful motion to dismiss for lack of subject matter jurisdiction, Hughes moved for summary judgment. The district court granted the motion, finding that Hughes had properly informed and secured the approval of the Air Force and all but one of the relevant contractors for the commonality agreements, and that any failure to inform was excusable because of security concerns relating to the B-2 program. Consequently, the district court concluded that there was no genuine issue of material fact as to whether Hughes had submitted a false claim.

On appeal, Schumer challenges the district court's grant of summary judgment on the merits and also contends that the district court erred by refusing to reopen discovery, grant him leave to amend, and return the case to the jury docket. In a

cross-appeal, Hughes asserts that the 1986 amendments to the False Claims Act do not apply retrospectively, and that the court therefore must dismiss the action under the pre-1986 statute, which contained a jurisdictional bar that precluded the court from hearing a *qui tam* action when the government had knowledge of the relator's allegations prior to the filing of the suit. Alternatively, Hughes argues that the district court improperly failed to dismiss the case for lack of subject matter jurisdiction because the complaint was "based upon the public disclosure of allegations," a condition under which the court's jurisdiction is barred by the 1986 amendments to the False Claims Act, 31 U.S.C. § 3730(e)(4)(A). Finally, Hughes contends that *qui tam* actions are inherently unconstitutional and requests attorneys' fees on the ground that the appeal is frivolous.

DISCUSSION

I. Retrospectivity of the Jurisdictional Bar

Because the 1986 amendments to the False Claims Act altered subject matter jurisdiction rules, we must first address whether the jurisdictional amendment applies retrospectively in order to determine whether the district court had subject matter jurisdiction. *See Wang v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir. 1992). Since this is an issue of statutory interpretation, we review it de novo. *Braun v. INS*, 992 F.2d 1016, 1018 (9th Cir. 1993).

Whereas the pre-1986 Act barred cases brought by *qui tam* plaintiffs when their allegations were "based on evidence or information the Government had when the action was brought," 31 U.S.C. § 3730(b)(4) (1982), the 1986 amendments narrowed this bar to the more limited class of cases based on information previously disclosed to the public, 31 U.S.C. § 3730(e)(4). Specifically, Hughes argues that the more restrictive rules of

the pre-1986 Act should apply because Schumer's allegations involve cost allocations primarily made prior to 1986. Since the government was aware of Schumer's allegations before he filed his suit, the pre-1986 rules would bar his claim.[1] We reject this argument because the jurisdictional bar of § 3730(e)(4) applies retrospectively and therefore controls this case.

The first step of retrospectivity analysis is to consider whether Congress has demonstrated in the statute itself or in its legislative history an intent for the statute to apply retrospectively. *Landgraf v. USI Film Products*, ___ U.S. ___, ___, 114 S.Ct. 1483, 1500 (1994). If so, the statute should be construed in accordance with that congressional intent. Here, however, Congress did not demonstrate an intent that the FCA should apply retrospectively. *See United States v. Murphy*, 937 F.2d 1032, 1037 (6th Cir. 1991); *United States ex rel. McCoy v. California Medical Review, Inc.*, 723 F.Supp. 1363, 1368 (N.D.Cal.1989).

Absent such a demonstration, we presume that a statute altering substantive rights applies only prospectively. *See Landgraf*, ___ U.S. at ___, 114 S.Ct. at 1500. The *Landgraf* Court, however, carved out an exception to that rule in the case of jurisdictional statutes. The Court applied a strong presumption that jurisdictional statutes apply retrospectively, for such statutes ordinarily "speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf*, ___ U.S.

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[1] Because the government allegedly became aware of the allegations through the 1986 government audit, which pre-dated the 1986 amendments, this case differs from *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 814 (9th Cir. 1995), in which we declined to consider the retroactivity of the jurisdictional bar because the relator's disclosure to the government occurred after 1986. *Id.* at 814-15.

at ___, 114 S.Ct. at 1501 (quoting *Republic National Bank of Miami v. United States*, ___ U.S. ___, ___, 113 S.Ct. 554, 565 (1992) (Thomas, J., concurring)). Because the 1986 amendment explicitly effects a jurisdictional bar, *see* 31 U.S.C. § 3730(e)(4) ("No court shall have jurisdiction ..."); *Wang v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir. 1992), we presume that it applies to the present action.

Rebuttal of this presumption would require some indication that the jurisdictional rule curtailed a substantive right, by "impair[ing] rights a party possessed when he acted, increas[ing] a party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed." *See Landgraf*, ___ U.S. at ___, ___, 114 S.Ct. at 1502, 1505. However, we recently held that the 1986 jurisdictional bar does not have such a deleterious effect on substantive rights. *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1408 (9th Cir. 1995). In *Lindenthal*, we concluded that the jurisdictional bar "did not alter [the defendant's] underlying liability; it only altered the conditions under which a qui tam relator can bring an action to enforce that liability." *Id.*; *see also United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 814 (9th Cir. 1995) (stating that the 1986 amendments "did not change the legal consequences of the [defendant's conduct]"); *United States ex rel. LaValley v. First Nat'l Bank of Boston*, 707 F.Supp. 1351, 1362 (D.Mass.1988). Because the amendment does not infringe on the substantive rights of the defendant, it does not rebut the presumption of retrospective application of jurisdictional provisions. *See Lindenthal*, 61 F.3d at 1408-09. Accordingly, we apply the 1986 jurisdictional provision retrospectively to this case. *See id.*

II. Subject Matter Jurisdiction

Under the 1986 jurisdictional provisions of the False Claims Act, a *qui tam* action is barred if it is "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, of from the news media, unless ... the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A). In its cross- appeal, Hughes alleges that Schumer's action is barred because it is based upon unclassified government audits which have been disclosed publicly.

We review the question of whether the district court had subject matter jurisdiction de novo. *Nike, Inc. v. Comercial Iberica De Exclusivas Deportivas, S.A.*, 20 F.3d 987, 990 (9th Cir. 1994). We hold that Schumer's allegations were not publicly disclosed and therefore that the district court properly exercised jurisdiction.

Claiming that Schumer's allegations are based upon charges made by certain government audit reports, Hughes contends that these audits effectively had been disclosed to the public prior to the filing of Schumer's suit as a result of (1) disclosure of the audits' allegations to "innocent" Hughes employees; and (2) the availability of the audits through the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. We reject both arguments.

A. Disclosure to Employees

Hughes argues that the dissemination of government audits to employees of Hughes and Northrop who were not involved in the alleged fraud constituted public disclosure. Hughes relies on *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992), in which the Second Circuit held that

public disclosure occurred when federal investigators arrived at the defendant company's offices with a search warrant and informed employees on site that they were investigating allegations of fraudulent overcharging under defense contracts. *See id.* at 319-20. Rejecting the argument that disclosure had not occurred because the information was disseminated to a limited number of persons, the court stated that "[o]nce allegations of fraud are revealed to members of the public with no prior knowledge thereof, the government can no longer throw a cloak of secrecy around the allegations." *Id.* at 323.

We decline to adopt the rule of *Doe* for application in this circuit. At one level, the *Doe* court's treatment of company employees as members of the public is unrealistic. Unlike others who come across information related to fraud, an "innocent employee who comes forward with allegations of fraud by her employer knows that her job may be in jeopardy." *Doe*, 960 F.2d at 325 (Walker, J., dissenting). Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure. Because disclosure of such allegations could reflect negatively on both Northrop and Hughes, this reasoning applies to employees of both companies.

Indeed, this circuit has indicated that disclosure by one government employee to another would not constitute public disclosure. *See United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991). Yet in the context of defense procurement, security considerations generally require that the government, contractors, and subcontractors operate within a closed loop of secrecy. We see no principled distinction between disclosures to other government employees and to employees of defense contractors and sub-

contractors. Both situations involve the release of information within a private sphere. Under a "practical, commonsense interpretation" of the jurisdictional provisions, information that was "disclosed in private" has not been publicly disclosed. *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1161 (3d Cir. 1991).

Moreover, by treating employees of the defendant company as "members of the public" to whom "public disclosure" can occur, *Doe*, 960 F.2d at 323, the *Doe* court ignored one of the stated purposes of the 1986 amendments to the False Claims Act. As this circuit has noted, the 1986 amendments were adopted in part to correct a restrictive interpretation of the Act which barred *qui tam* suits whenever "the government already possessed the information" upon which the lawsuit was based. *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992) (citing S.Rep. No. 345, 99th Cong., 2d Sess. 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269). The *Doe* rule would run contrary to this purpose, for it drastically curtails the ability of insiders to bring suit once the government becomes involved in the matter. If revelation to employees at this stage would constitute public disclosure, any employee who receives word of government allegations would be barred from bringing suit. Contrary to Congress's intentions for the jurisdictional bar, the *Doe* rule "effectively shifts the standard from 'public disclosure' back to 'government investigation,'" so that government possession of information relating to fraud effectively forecloses *qui tam* suits. *Doe*, 960 F.2d at 326 (Walker, J., dissenting).

Such a restrictive interpretation necessarily requires greater reliance on government action. Yet in passing the 1986 amendments, Congress specifically sought to diminish the government's ability "to sit on, and possibly suppress, allegations of fraud when inaction might seem to be in the interest of

the government." *Doe*, 960 F.2d at 323; S.Rep. No. 345, 99th Cong., 2d Sess. 24-26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289-91 [hereinafter Senate Report]. The 1986 amendments also reflected Congress's recognition that the government simply lacks the resources to prosecute all viable claims, even when it knows of fraudulent conduct. *See* Senate Report, *supra*, at 2. Thus, we reject the *Doe* court's definition of "public disclosure," which forecloses many insiders from bringing *qui tam* actions, as contrary to the intent of the statute.

Although Hughes raises the concern that our rule would open the floodgates to parasitic *qui tam* actions whenever the government audits a company, any such effect would be limited to a single lawsuit in each instance, since the first filing would constitute public disclosure sufficient to bar other claims based upon the audit. *See United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1157-58 (2d Cir.) (noting that the statute seeks to bar parasitic lawsuits), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2962 (1993). With this concern offset by Congress's desire to avoid total reliance on government enforcement, we hold that disclosure to company employees does not constitute public disclosure.

B. Disclosure through the FOIA

Although Hughes does not dispute that certain classified reports underlying Schumer's claims were not available to the public, Hughes argues that three unclassified government audits by the Defense Contract Audit Agency ("DCAA") were publicly disclosed because they were potentially available to any member of the public who filed a request for release of the audits under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Hughes argues that because the regulations provide that "[r]ecords not specifically exempt from disclosure under the [FOIA] shall, upon request, be made accessible to the

public," 32 C.F.R. § 286.7(b), unclassified documents are necessarily publicly disclosed.

Hughes relies on an analogy to precedent holding that allegations made available through the discovery process are deemed publicly disclosed. *See Kreindler*, 985 F.2d at 1158 (holding that discovery material contained in unsealed court records was "publicly disclosed"); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1155-56 (3d Cir. 1991). In *Stinson*, the Third Circuit held that because the FCA seeks "to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it," *id.* at 1155-56, "the disclosure of discovery material to a party who is not under any court imposed limitation as to its use is a public disclosure under the FCA." *Id.* at 1158. This rule applies regardless of whether the discovery material actually has been filed with the court. *Id.*

By contrast, the District of Columbia Circuit in *United States ex rel. Springfield Terminal Ry. Co.*, 14 F.3d 645 (D.C.Cir. 1994), rejected the view that a discovery document turned over to another party to the litigation, but not actually filed with the court, should be deemed publicly disclosed. *Springfield Terminal* concluded that only discovery material "actually made public through filing" was disclosed. It concluded that discovery material exchanged by parties but not filed with the court "is only *theoretically* available upon the public's request." *Id.* at 652 (emphasis in original).

We conclude that the District of Columbia Circuit's distinction between *actual* and *theoretical* availability is persuasive, and we reject the rationale of *Stinson* to the extent that it comes to an opposite conclusion. The distinction between *actual* and *theoretical* disclosure is particularly instructive on the question of whether the DCAA audits in this

case were publicly disclosed because of potential availability under the FOIA. Although a document on file with the court may be examined by any member of the public upon a request to the clerk and thus can fairly be deemed actually available, a document held by the government and subject to public inspection only after all FOIA conditions have been satisfied is far less accessible to the public.

Although Schumer eventually filed a successful FOIA for copies of the audits, he filed his suit prior to any request for or release of the audits. In the FOIA context, information cannot be deemed disclosed until a member of the public requests the information *and receives it* from the government. Only then is the information *actually*, rather than *theoretically* or *potentially*, available to the public. Because the audits were not actually available prior to Schumer's suit, we find that they were not actually disclosed.

Our view finds support in the Supreme Court's conclusion that the FOIA requirements "relate[ ] to disclosure *initiated by a specific request* from a member of the public." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (quoting H.R.Conf.Rep. No. 94-1022, 94th Cong., 2d Sess. 27 (1976)) (emphasis added). Although the Court stated that disclosures through the FOIA are public disclosures within the meaning of the Consumer Product Safety Act, 15 U.S.C. § 2055(b)(1), it specifically referred to such disclosures as "the disclosure of information *in response to* an FOIA request." *Id.* at 109 (emphasis added). Even in *Stinson*, the court noted that "public disclosure" should be given a "practical, commonsense interpretation" such that information "hidden in files" would not be public. *Stinson*, 944 F.2d at 1161.

Moreover, a definitive assessment of whether government information is exempt from disclosure under one of the enumerated FOIA exceptions does not occur until *after* a

request has been made for the release of the information. *See* 32 C.F.R. § 286.16(d). The Defense Department's regulations specifically require that once a FOIA request for the document has been made, there must be an "examination for the presence of information that requires continued protection" such that "under the current circumstances, FOIA exemptions apply." *Id.* § 286.16(b), (d). Even documents that were not previously marked "For Official Use Only," which normally indicates that a FOIA exemption applies, "shall not be assumed to be releasable" without such an examination. *Id.* 286.16(d). Because the final assessment of whether the audits could be exempt from the FOIA would not take place until after a formal request for their release, they cannot be deemed to have been publicly disclosed prior to such a request.

Because we find that there was no public disclosure of the government audits, we need not address whether Schumer's claims were "based upon" those audits, or whether Schumer was an "original source" of the allegations. *Wang v. FMC Corp.*, 975 F.2d 1412, 1416 (9th Cir. 1992).

III. Constitutionality

Hughes argues that the *qui tam* provisions are unconstitutional because they violate the Article III standing requirement, the doctrine of separation of powers, and the Appointment Clause's limitation on who may conduct litigation on behalf of the United States. This circuit previously has addressed and rejected these exact arguments. *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 747-759 (9th Cir. 1993); *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827, 830 (9th Cir. 1993); *see also Kreindler*, 985 F.2d at 1153-55 (holding that the *qui tam* provisions are constitutional). Accordingly, we deny Hughes's cross-appeal and consider the merits of Schumer's claims.

IV. Summary Judgment

Schumer bases his *qui tam* action on several claims. Specifically, he argues that (1) Hughes improperly charged the development costs of "gate array" technology for the Analog Signal Converter ("ASC") to the B-2 contract; (2) Hughes failed to disclose to Northrop the commonality agreement relating to the Radar Digital Processor ("RDP"); and (3) the agreements violated the Cost Accounting Standards ("CAS").

We review the district court's grant of summary judgment on these issues de novo. *Jesinger v. Nevada Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). Viewing the evidence in the light most favorable to Schumer, we consider whether there are any genuine issues of material fact. *Id.*

A. Charging of Gate Array Development Costs to the B-2 Subcontract

In asserting that Hughes mischarged costs to the B-2 program that should have been charged to the F-15 program, Schumer focuses on the charging of the development costs of "gate array" microcircuitry for use in the ASC component of the B-2 and F-15 radar systems. Schumer alleges that Hughes violated the False Claims Act by charging for costs that are "unallowable." If Hughes knowingly made unallowable charges to the B-2 account, the FCA would be implicated. *See* 10 U.S.C. § 2324(i).[2]

Schumer argues that costs allocated to the B-2 subcontract were unallowable pursuant to the contract between Northrop

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[2] Section 2324(i) provides that: The submission to the Department of Defense of a proposal for settlement of costs for any period after such costs have been accrued that includes a cost that is expressly specified by statute or regulation as being unallowable, with the knowledge that such cost is unallowable, shall be subject to the provisions of ... [the False Claims Act].

and Hughes. *See* 48 C.F.R. § 31.201-2(a) (noting that determination of allowability involves consideration of "terms of contract").[3] First, he argues that the pricing of the B-2 subcontract was premised on the use of existing radar modules, so the pricing and cost accumulation for radar modules could not deviate from the original understanding. Any change affecting costs, such as the development of gate array technology, would require a "change proposal" before such costs could be allowable.

The district court properly found that the B-2 subcontract agreement did not require the use of any particular radar module. Furthermore, the subcontract's language that "the ATB air vehicle components and subsystems will undergo technical definition, design, layouts, trade studies, and development process in order to define the required weapon system" indicates that the contract contemplated the possibility of development costs arising from a new design of the radar subsystem. Indeed, four Hughes witnesses testified in depositions that the parties believed that the contract merely laid out performance specifications and left the matter of design to Hughes. For example, David D. Lynch, Jr., a Hughes vice president, stated, "It was understood by Hughes, Northrop, and the Air Force that the design of the radar would not be fixed at the outset ... the design of the radar was entirely the prerogative and responsibility of Hughes."

Schumer failed to provide any contrary testimony to challenge this interpretation. The only relevant evidence that

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[3] 48 C.F.R. § 31.201-2(a) provides that: The factors to be considered in determining whether a cost is allowable include the following: (1) Reasonableness. (2) Allocability. (3) Standards promulgated by the CAS Board, if applicable ... (4) Terms of the contract. (5) Any limitations set forth in this subpart.

he points to with respect to this issue is testimony asserting that Northrop and the Air Force had to agree to the particular hardware configuration. Yet Schumer has failed to provide evidence to offset Hughes's assertion that all relevant parties agreed to the use of the gate array technology in order to satisfy the technical requirements of the B-2 project. Several witnesses testified that the Air Force and Northrop determined in 1982 that weight reduction would be necessary to satisfy the B-2's mission profile. As a consequence, Hughes began to develop a lighter radar module that depended on gate array technology. Significantly, Lynch testified that Hughes presented the gate array design to Northrop and the Air Force in 1982 and notified Northrop of the specific details of the design in 1983. Because Schumer has not provided evidence to contradict Hughes's assertions, he has failed to raise a genuine issue of material fact as to whether the contract permitted the use of the gate array technology. *See* Fed.R.Civ.P. 56(e) (requiring the adverse party to provide "specific facts" to show a genuine issue of material fact); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Therefore, we affirm the grant of summary judgment on this claim.

Second, Schumer argues that since the gate array technology was approved for use in the F-15 *before* approval for use in the B-2, Northrop implicitly conditioned its approval of gate array for the B-2 implicitly on the requirement that the F-15 account bear all the development costs. However, Schumer presents no evidence to controvert the report of the Defense Logistic Agency's Administrative Contracting Officer that "the requirements for the gate array upgraded Analog Signal Converter existed on the B-2 program *prior* to the award for the F-15 MSIP contract." In addition, a report of the Air Force's chief engineer stated that, "[t]he initial design effort using gate array technology was started on the B-2 Program in March 1982 to meet technical requirements of the B-2 radar." More-

over, Schumer did not controvert the evidence that McDonnell Douglas, the prime contractor for the F-15 project, did not approve the use of the gate array ASC for that aircraft until 1984, two years after Hughes began designs for gate array for the B-2 project.

Schumer cites documents, credited by the district court, that demonstrate the incorporation of gate array ASC into design studies for the F-15 MSIP as early as August 1982, and reveal that the designs were absent from some diagrams of the B-2's radar from late 1982 and early 1983. However, these shed no light on whether *approval* of the use of gate array technology in the F-15 MSIP occurred before or after approval of its use on the B-2. Indeed, Schumer's reference to proposals for and contemplation of "commonality efforts" involving the F-15 in 1983 is entirely consistent with Hughes's evidence of prior approval of the development of gate array ASC for the B-2 program. Without evidence of prior approval of gate array technology for the F-15 program, Schumer's claim that the parties in the B-2 project understood all development costs to be attributable to the F-15 program cannot survive summary judgment.

The remaining arguments arising from the charging of ASC costs to the B-2 program similarly lack merit. Schumer asserts that, as part of its formal proposal for the F-15 contract, Hughes certified that no accumulated hours of labor had been recorded for work on gate array technology. Although Schumer argues that this indicates that the use of gate array technology on the B-2 had not commenced before work on the F-15, any inference that might be drawn from this fact is negated by the Air Force chief engineer's report, which stated that the "classified nature of the B-2 program precluded Hughes from discussing any aspect of the B-2 program with any other Hughes' customers ... [and] this prevented Hughes

from disclosing full details regarding commonality in its pricing of the F-15 MSIP and F-14D programs." Schumer has failed to dispute this explanation.

Finally, Schumer asserts that the absence of evidence that Hughes ever sought "military qualification" for gate array technology for use with the B-2 program indicates that charges to that program were not allowable. However, Air Force technical advisor Ronald Longbrake testified that "one gate array had been fully qualified in 1983 for military application and another one was nearing completion of military qualification." We find insufficient evidence to create an issue of material fact. *Celotex*, 477 U.S. at 324. Accordingly, we affirm the district court's grant of summary judgment on Schumer's claim that ASC costs charged to the B-2 program were not allowable.

B. Disclosure of RDP Commonality Agreements

Because the RDP was used in both the F-15 and the B-2, Hughes established a commonality agreement to govern allocation of costs between the two accounts by which "development costs" would be charged only to the F-15, and other costs would be split between the programs. Schumer contends that until 1984, Hughes did not disclose adequately to Northrop's subcontracts manager the specific formula for cost allocation, including what Schumer calls the "arbitrary baseline" for determining which costs would be classified as "development" costs. Schumer argues that this failure caused Northrop to be misled as to the costs to the B-2 program, thus creating a substantial issue as to the reasonableness of allowing the RDP charges. *See* 48 C.F.R. § 31.201-2(a)(1) (stating that "reasonableness" of charges is a factor in determining allowability); *see supra* note 2.

Hughes provides evidence that on December 7, 1982, Hughes informed Northrop of the commonality agreement and the definition of the development stage. The commonality agreement itself, dated December 14, 1982, articulated a baseline between development and production costs that closed development at the point known as "production drawing release." Furthermore, on January 23, 1983, Hughes disclosed the agreement to Northrop's radar manager, Robert Davis, who testified that he understood the meaning of the baseline. Both the Air Force and Northrop subsequently approved the use of the F-15's RDP based in part on the disclosure of the commonality agreement.

Schumer counters this evidence by noting that Northrop's "cognizant contracting officer," Robert Blakeney, denied having learned of the commonality agreement. Blakeney also drafted a white paper in 1986 which stated that the December 1982 disclosure, although outlining the commonality arrangement, was made "with no technical, schedule or cost impact attendant thereto." This white paper noted that although the use of the RDP for both programs was approved in January 1983, the commonality agreement that "defined the shared funding responsibilities" was developed, approved, and "unilaterally implemented with no customer participation."

This evidence, taken together, raises a genuine issue of material fact as to whether Hughes had disclosed sufficiently the terms of the commonality agreement to Northrop, particularly the manner in which the development costs, covered solely by the F-15 program, would be defined. Although the white paper does not contradict the existence and approval of a commonality agreement to use the RDP for both programs, it indicates that Northrop may not have received adequate information on specific cost impacts under the scheme. Significantly, Davis, the witness upon whose deposition testimony

Hughes relies to show disclosure to Northrop, was a signatory to the white paper and its claim that the proposal approved in 1983 lacked any cost impact analysis. Although the white paper could be construed as consistent with Davis's deposition testimony that he understood the commonality agreement's baseline for development costs, we must view the evidence in the light most favorable to Schumer. *See Tzung v. State Farm Fire & Cas. Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989). Because a factfinder could choose to credit the conclusions reached in the white paper signed by Davis, rather than Davis's deposition testimony, we find that Schumer created a genuine issue of material fact as to whether Hughes's efforts at disclosure were sufficient.[4]

Schumer also argues that the baseline itself is inherently arbitrary and contrary to military standards. He claims that several applicable factors should have been applied to define the time at which the design and development stage moves to the production stage. However, Schumer provides no authority for this claim, nor does he demonstrate that the baseline selected was inconsistent with these other factors. Moreover, Davis's statement that the baseline was the one "usually and

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[4] Schumer also claims that any disclosure to Davis, the radar manager, was insufficient because only evidence of specific approval by Blakeney, the contracting officer, would defeat his claim. We decline to rule on this basis because Schumer provides no evidence to indicate that Davis, who was the Northrop representative with whom Hughes consulted on a regular basis, lacked the authority to grant any approval required by the contract or by law. In fact, Schumer concedes that the subcontract did not require the filing of a formal "change proposal" for the RDP commonality agreement, subject to formal approval by Northrop. In addition, we find that Schumer waived his claim under the Truth in Negotiations Act, 10 U.S.C. § 2306a, because he did not argue that claim in his opening brief. *See All Pacific Trading, Inc. v. Vessel M/V Hanjin Yosu*, 7 F.3d 1427, 1434 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1301 (1994).

generally agreed upon" indicates that Northrop had approved the use of such a baseline in the past. This particular argument fails to raise an issue of material fact.

Nevertheless, we reverse the district court's grant of summary judgment on the claim that Hughes failed to disclose adequately to Northrop the terms of the RDP commonality agreement.

C. Compliance with the CAS

Schumer further alleges that Hughes violated the FCA by failing to comply with the CAS that were incorporated in the B-2 and F-15 subcontracts. First, he argues that Hughes violated a CAS prohibition on pooling of direct costs. 48 C.F.R. § 9904.402-30. Second, Schumer asserts that Hughes's practices did not conform to CAS § 401, which requires that "a contractor's practices used in estimating costs in pricing a proposal shall be consistent with his cost accounting practices used in accumulating and reporting costs." 48 C.F.R. § 9904.401-40(a). Third, he argues that Hughes failed to comply with CAS disclosure statement requirements because it did not properly disclose its cost allocation practices in the filed statement. 48 C.F.R. § 9903- 202. Since a contractor's compliance with the Cost Accounting Standards is relevant to the determination of whether the costs it claims to have incurred are allowable, 48 C.F.R. § 31.201-2(a)(3); *see supra* note 2, and unallowable costs can trigger the False Claims Act, see 10 U.S.C. § 2324(i); *see supra* note 1, Schumer contends that evidence of noncompliance with the CAS should preclude summary judgment.

Although Schumer did not allege these claims in his complaint, we consider them because when a party raises a claim in materials filed in opposition to a motion for summary judgment, the district court should treat the filing as a request

to amend the pleadings and should consider whether the evidence presented creates a triable issue of material fact. *See Apache Survival Coalition v. United States*, 21 F.3d 895, 910-11 (9th Cir. 1994); *Johnson v. Mateer*, 625 F.2d 240, 242 (9th Cir. 1980); *see also William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1052- 54 & n. 68 (9th Cir. 1981) (holding that district court properly considered on summary judgment an antitrust plaintiff's vertical conspiracy claim that had not been raised in the complaint), *cert. denied*, 459 U.S. 825 (1982). On remand, the complaint should be considered so amended.

On the merits, Schumer first argues that the costs of producing the radar components for the B-2 and F-15 were "direct costs" and therefore could not be "pooled" in a commonality agreement. However, Schumer fails to cite any portion of the regulations that prohibits pooling of direct costs. Instead, he argues that the existence of a definition for "indirect cost pool," but not for a direct cost pool, implies such a prohibition. *See* 48 C.F.R. § 9904.402-30. We reject Schumer's claim because he has presented no genuine issue of material fact on this claim.

A direct cost is one "identified specifically with a particular final cost objective." *Id.* § 9904.402-30(a)(3). An indirect cost is "any cost not directly identified with a single final cost objective, *but identified with two or more final cost objectives or with at least one intermediate cost objective*." *Id.* 9904.402-30(a)(6) (emphasis added). As noted by the regulations, many types of costs can be classified as either direct or indirect. *See* 48 C.F.R. § 9904.402-50. For example, certain travel costs, planning costs, general tooling costs, and costs of employees engaged to perform duties that benefit several contracts can be treated as either direct or indirect, depending on the circumstances. *See* 48 C.F.R. § 9904.402.60. Beyond

his mere allegations, Schumer has provided no evidence to indicate that Hughes has improperly classified as indirect costs any specific costs that the regulations only permit to be treated as direct costs.

Moreover, Schumer's claim that the commonality agreements constituted impermissible "pooling" of direct costs lacks substantiation. Whereas Schumer focuses on direct labor costs as impermissibly pooled, he has not provided evidence to show that such costs were grouped into any pooling arrangement prohibited by the regulations.[5] The fact that Hughes's commonality agreements discuss allocation of direct labor costs would only constitute improper pooling if they set forth an improper method of allocation. However, Schumer has not shown this to be the case. The regulations specifically provide that when direct labor and material costs benefit more than one contract, they often may be allocated according to pre-established measures that estimate the benefits provided to the specific contracts. *See* 48 C.F.R. § 9904.407. Hughes's commonality agreements that discuss direct labor costs indicate in general terms that such costs are to be allocated to contracts based upon various estimates of benefit to those accounts, such as the number of modules ordered by each program in a given year. Schumer has provided no evidence to show that such direct labor costs are charged on some basis other than a mea-

[5] The only requirements regarding direct and indirect costs explicitly stated in the cited section of the regulations are that contractors must (1) file disclosure statements that set forth their accounting practices and the bases upon which they have made classifications of costs as direct or indirect; (2) treat costs consistently as either direct or indirect across contracts; and (3) amend the disclosure statement if they make any changes in practices. *See* 48 C.F.R. § 9904.402-40, -50. Although the regulations require that direct costs be allocated to the contracts which they benefit, *see id.* § 9904.418, they do not expressly prohibit pooling of direct costs.

sure of the actual work performed for the benefit of a given contract, nor has he shown that any of the commonality agreements' statements on how such benefits were to be calculated applied an impermissible estimate. Absent evidence to show such a violation, we find no genuine issue of material fact on Schumer's claim regarding direct cost pooling.

On Schumer's other CAS claims, the evidence indicates that there is no genuine issue of material fact on whether Hughes's practices violated CAS § 401. Contrary to Schumer's assertion, the audit report specifically states that Hughes's "bidding and accumulating of costs was in compliance with CAS § 401." However, the audit report did indicate that for the period from December 1982 to January 1984, Hughes violated the CAS by failing to state accurately in its disclosure statement its practice of accumulating costs at a more detailed level than in its bidding estimates. *See General Motors Corp. v. Aspin*, 24 F.3d 1376, 1382-83 (Fed.Cir. 1994) (noting that disclosure statements must accurately describe the accounting methods used). This noncompliance with the CAS may have rendered the costs unallowable under 48 C.F.R. § 31.201-2(a)(3), which requires that "[s]tandards promulgated by the CAS" be considered in determining allowability of costs. *Id.*

Although the Administrative Contracting Officer found that this noncompliance had an "immaterial impact" on costs, the lack of a determination of actual harm from the CAS violation does not preclude a claim under the FCA. *See, e.g., Rex Trailer Co. v. United States*, 350 U.S. 148, 152, 76 S.Ct. 219, 222, 100 L.Ed. 149 (1956); *United States v. Kensington Hosp.*, 760 F. Supp. 1120, 1127 (E.D.Pa.1991) (citing cases). Because the audit found that Hughes's disclosure statement improperly failed to reflect the impact of the commonality agreements, we hold that this violation of the CAS creates a

genuine issue of material fact relating to a violation of the False Claims Act. Accordingly, we reverse the district court's grant of summary judgment on this issue.

V. Motion to Reopen Discovery

In April 1992, after the summary judgment motion had been argued, Schumer moved to reopen discovery based on a story in the *Los Angeles Times* that described allegations filed in a *qui tam* case by another former Hughes employee, Linda Lujan, similarly alleging that "Hughes had inflated the cost of the B-2's radar by billing expenses to it from other defense programs." The story disclosed that Hughes's former "ethics boss," Tom Pierce, had left Hughes because of an inability to obtain "satisfactory answers" concerning Lujan's allegations, and it discussed a December 1988 audit that apparently concluded that Hughes had mischarged $70,000 to the B-2 subcontract.

The article also referred to Pierce's replacement, Joseph Savroni, whom Schumer maintains wrote a note for Lujan's file to the effect that her alleged discoveries might get the Department of Defense "involved [through] the back door via her lawyer and eventually threaten our commonality system for some charges." Schumer argues that the district court should have granted his motion to reopen discovery for the "limited purpose" of deposing Pierce and Savroni and obtaining access to the audit mentioned in the report and any other relevant reports.

Denial of a motion to reopen discovery is reviewed for "a clear abuse of discretion." *United States ex rel. Army Athletic Ass'n v. Reliance Ins. Co.*, 799 F.2d 1382, 1387 (9th Cir. 1986) (quoting *Foster v. Arcata Assocs.*, 772 F.2d 1453, 1467 (9th Cir. 1985)). In applying this standard, courts consider such factors as:

> 1) whether trial is imminent, 2) whether the request is opposed, 3) whether the non-moving party would be prejudiced, 4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court, 5) the foreseeability of the need for additional discovery in light of the time allowed for discovery by the district court, and 6) the likelihood that the discovery will lead to relevant evidence.

Smith v. United States, 834 F.2d 166, 169 (10th Cir. 1987).

Applying these criteria, we hold that the district court did not abuse its discretion in denying the motion. Although Schumer was reasonably diligent in pursuing discovery prior to this request, it cannot be said that the need for the information sought could not have been foreseen prior to the publication of the newspaper article. Since Schumer's charges centered around ethical violations relating to the commonality agreements, he could have sought the files of the Ethics Department relating to B-2 accounts, as well as the deposition of Pierce, during the original discovery period. The claim that Schumer only recently learned of these sources, through the newspaper article, does not necessarily justify additional time for discovery. *Cf. Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1514 (10th Cir. 1990) (denying motion to reopen discovery despite claim that plaintiffs only recently learned of a new basis for the claim).

Moreover, it is unclear whether additional discovery is likely to "lead to relevant evidence." *Smith*, 834 F.2d at 169. Schumer's allegations focus on legal violations in the construction of the commonality agreements and Hughes's failure to disclose the arrangements to Northrop and the government. By contrast, the audit sought in this case appears to address whether there was mischarging under the guidelines set by the commonality agreements, not whether the agreements them-

selves were improperly established. Indeed, Schumer alleges that he had personal knowledge only of Hughes's intent to enter into commonality agreements without full disclosure, not of specific mischarging.

In addition, testimony by Savroni, who succeeded Pierce as ethics chief in 1989, is unlikely to lead to relevant evidence on whether the commonality agreements, conceived in the early 1980s, were properly established. *Cf. Reliance*, 799 F.2d at 1388 (noting that it was "unlikely" that the requested depositions would lead to the development of any relevant evidence). Therefore, Schumer can "only speculate[ ] as to what evidence, if any, further discovery would produce." *Gray v. Town of Darien*, 927 F.2d 69, 74 (2d Cir.), *cert. denied*, 502 U.S. 856 (1990). Especially when this circuit has held that a district court "has wide latitude in controlling discovery," *Reliance*, 799 F.2d at 1387 (quoting *Foster*, 772 F.2d at 1467), we find that the district court did not abuse its discretion in denying the motion to reopen discovery.

VI. Leave to Amend

In January 1992, Appellant moved to amend his complaint to include claims under the "whistleblower" provision of the False Claims Act, 31 U.S.C. § 3730(h), and a similar state law provision, Cal.Gov't Code § 12653, both of which give a civil cause of action to employees who were discriminated against by employers for pursuing *qui tam* actions. Schumer argues that the district court abused its discretion in declining to permit the amendment because it "would have served judicial economy" since the claims "clearly arose from the same nucleus of fact." We reject this argument and affirm the district court's ruling.

Failure to permit leave to amend is reviewed for abuse of discretion. *Roth v. Garcia Marquez*, 942 F.2d 617, 628 (9th

Cir. 1991). In assessing the propriety of a motion for leave to amend, we consider factors such as "bad faith, undue delay, prejudice to the opposing party, and futility of amendment." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

The circumstances surrounding the motion for leave to amend demonstrate that the motion was made after undue delay. Although Schumer knew all of the facts relevant to the "whistleblower" claim when the complaint was filed on January 23, 1989, he did not move to amend until three years later. The existence of undue delay supports denial of a motion for leave to amend. *See Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 799 (9th Cir. 1991) (denying leave to amend after two year delay); *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). Moreover, permitting the amendment would have required Hughes to address new legal theories and would have required extensive additional discovery, all of which would have been prejudicial. *See Texaco*, 939 F.2d at 798-99. Finally, Schumer had already amended the complaint once before this motion was filed. *See Mir v. Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980) (holding that the district court's discretion is especially broad when the court has previously given the plaintiff an opportunity to amend). Thus, although we are aware that "Rule 15's policy of favoring amendments to pleadings should be applied with 'extreme liberality'," *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981), we cannot conclude under the circumstances present here that the district court abused its discretion in denying Schumer's motion for leave to amend.

VII. Jury Trial

Finally, Schumer claims that the district court improperly found that he had waived his right to a jury trial, or alternatively, that the district court abused its discretion in

refusing to reinstate the action on the jury docket pursuant to Rule 39. *See* Fed.R.Civ.P. 39(b). We reject both contentions.

Schumer does not contest that the statements and actions of his prior counsel would have constituted a valid waiver if he had been properly informed of them. Instead, Schumer contends that because his attorney "actively misled" him, his counsel's statements and actions regarding the jury demand are not binding. Thus, he argues that his counsel's actions do not constitute a knowing and voluntary waiver of his (Schumer's) constitutional right to a jury trial.

We need not decide whether a party may challenge a waiver entered by his counsel on the grounds raised by Schumer. In this case, Schumer's new counsel was aware of the previous counsel's waiver well before the validity of that waiver was challenged. Instead of challenging the waiver or moving to have the case returned to the jury docket, Schumer's new counsel participated voluntarily in proceedings designed to further a bench trial.[6] Because Schumer's attempts to disassociate himself from the waiver by his former counsel were not asserted below in a timely waiver, we affirm the district court's conclusion that the jury demand was waived.

Although we conclude that Schumer waived his right to a jury trial, we must also address his contention that the district court abused its discretion in denying his motion to reinstate the action on the jury docket. *See* Fed.R.Civ.P. 39(b); *see also Chandler Supply Co. v. GAF Corp.*, 650 F.2d 983, 987 (9th Cir.

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[6] We need only mention one instance to demonstrate that the issue was not raised in a timely fashion. New counsel was appointed in September 1991. In January 1992, the court clerk announced, at the conclusion of a motions hearing, that a date had been set for a *non-jury* trial. Schumer's new counsel made no objection either to the date or to the manner in which the trial would be conducted.

1980) (holding that denials of Rule 39 motions are reviewed for abuse of discretion). Given Schumer's failure to raise the issue of his counsel's deception in a timely manner, we conclude that the district court did not abuse its discretion in denying the motion. Accordingly, we affirm.

CONCLUSION

For the reasons stated, we hold that the 1986 jurisdictional bar to the False Claims Act, which applies retrospectively, does not prevent subject matter jurisdiction in this case because there was no "public disclosure" of Schumer's allegations. On the merits, we reverse the district court's grant of summary judgment on the claims of failure to disclose the commonality agreements to Northrop and failure to comply with the Cost Accounting Standards' disclosure requirements,[7] but affirm the court's grant of summary judgment on the remaining claims. We also affirm the district court's denial of Schumer's motions to reopen discovery, for leave to amend the complaint, and to return the case to the jury docket. Each party shall bear its own costs.

Affirmed in part; Reversed in part; and Remanded.

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[7] Because we reverse and remand on these claims, we decline to reach Hughes's claim for attorneys' fees.

APPENDIX B

[Filed November 17, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 92-55759, 92-55857
DC No. CV-89-0390-MRP

United States of America, *ex rel.*, William J. Schumer,

Plaintiff-Appellant/Cross-Appellee,

v.

Hughes Aircraft Company,

Defendant-Appellee/Cross-Appellant.

ORDER

Before: D.W. NELSON, REINHARDT, and BRUNETTI, Circuit Judges

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judges Reinhardt and Brunetti voted to reject the suggestion for rehearing en banc and Judge D.W. Nelson so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

[Filed November 1, 1990]

UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA

CV-89-0390-MRP

United States of America *ex rel* William J. Schumer,

Plaintiff,

v.

Hughes Aircraft Company,

Defendant.

ORDER

The Motion to Dismiss and the Motion for Summary Judgment by Defendant, and the Motion for Partial Summary Judgment and the Motion to Defer Consideration of Motion for Summary Judgment by Plaintiff, came regularly for hearing on October 29, 1990, Dean Francis Pace Esquire appearing for Plaintiff and James J. Gallagher Esquire appearing for Defendant. The Court having considered the briefs, affidavits and the argument by Counsel, and good cause not appearing, now therefore

IT IS ORDERED:

(1) The Motion to Dismiss by Defendant be and it is hereby denied;

(2) The Motion for Summary Judgment by Defendant be and it is hereby denied;

(3) The Motion for Partial Summary Judgment by Plaintiff be and it is hereby denied;

(4) The Motion to Defer Consideration of the Motion for Summary Judgment by Plaintiff be and it is hereby denied.

Dated: November 1, 1990

/s/ Mariana R. Pfaelzer
UNITED STATES DISTRICT JUDGE

Submitted By:

PACE QUINN AND ROSE

By /s/ Dean Francis Pace
Dean Francis Pace
Attorney for Plaintiff

Approved As To Form:

MCKENNA AND CUNEO

By /s/ Mark R. Troy
James J. Gallagher
Attorneys for Defendant

APPENDIX D

[Filed May 20, 1992]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 89-390 MRP

United States of America, *ex rel.*, William J. Schumer,

Plaintiff,

v.

Hughes Aircraft Company,

Defendant.

ORDER GRANTING SUMMARY JUDGMENT

The Motion of Defendant Hughes Aircraft Company ("Hughes") for Summary Judgment came on regularly for hearing on March 23, 1992 before this Court. The Court having considered the pleadings, papers, and the arguments of counsel,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Hughes' Motion for Summary Judgment is granted.

DATED: May 19, 1992

/s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge

APPENDIX E

[Filed May 20, 1992]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 89-390 MRP

United States of America, *ex rel.*, William J. Schumer,

Plaintiff,

v.

Hughes Aircraft Company,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court enters the following Findings of Fact and Conclusions of Law in conjunction with the Order Granting Hughes Aircraft Company's Motion for Summary Judgment entered concurrently herewith.

I. FINDINGS OF FACT

A. Commonality and Commonality Agreements

1. When Hughes designs, develops or manufactures radar parts for use in several different radar subcontracts, the costs of such design and development must be tracked and accounted for. Since 1978, Hughes has accounted for such costs by allocating them among the different subcontracts that utilize the

common parts to ensure that each subcontract incurs its fair share of the costs.

2. The common tasks, accounting controls and cost sharing arrangements are established by Hughes' program managers responsible for each of the different radar programs and Hughes' finance and accounting personnel and are set forth in Hughes' Commonality Agreements.

3. A "Commonality Agreement" is an internal Hughes memorandum of agreement executed by Hughes' program managers responsible for different radar subcontracts. Hughes' objective in implementing Commonality Agreements is to:

(a) define certain tasks which benefit more than one radar subcontract;

(b) establish accounting controls to ensure that the costs collected pursuant to the Commonality Agreements are allocated fairly among the different subcontracts.

4. Hughes implemented its first Commonality Agreement on March 24, 1978. That Commonality Agreement established an account for the pooling of costs associated with the manufacture of radar components that were common to the F-14, F-15 and F-18 radar contracts.

5. On April 13, 1978, Hughes submitted to the Air Force Plant Representative Office ("AFPRO") and the Defense Contract Audit Agency ("DCAA") an amendment to Hughes' Cost Accounting Standards ("CAS") Disclosure Statement for the Radar Systems Group Manufacturing Division, dated April 4, 1978. The amended Disclosure Statement described Hughes' Commonality accounting methodology:

> Direct labor cost incurred in the manufacture of common hardware is collected

in a holding account and is allocated to contracts based on requirements times standards.

6. Hughes' CAS Disclosure Statement is a written description of Hughes' cost accounting practices and procedures. Prior to the award of a government contract, the government's Administrative Contracting Officer is responsible for reviewing the contractor's Disclosure Statement for adequacy and compliance.

7. Hughes April 13, 1978 amendment to its Disclosure Statement was approved by the responsible government official.

8. In April 1978, Hughes provided the AFPRO and the DCAA with a briefing explaining the details of the Commonality accounting system, *i.e.*, how Commonality costs are collected in the cost pool (holding account) and how, in what percentage, the costs are allocated from the pool to the particular subcontracts.

9. Additional discussions occurred between Hughes and the AFPRO in 1978 and 1979 related to Commonality. Joseph R. Rohlinger, then Hughes Radar Systems Group controller, discussed Commonality cost sharing arrangements with AFPRO representatives Andrew A. Zalenski and Len Beder during that time period. Mr. Rohling informed the government that while Commonality cost sharing was then occurring only within Hughes' Manufacturing Division with regard to the manufacture of common hardware, Hughes was intending to employ the same Commonality accounting methodology for future radar engineering efforts within its Engineering Division.

B. Disclosure of Commonality to the Air Force and Northrop in Hughes' B-2 Proposal

10. Hughes began competing for the B-2 avionics in 1978. In 1979, Hughes was an unsuccessful competitor on the Lockheed B-2 proposal. In 1980, Hughes again was invited to compete with Westinghouse for the radar avionics on the Northrop B-2 proposal to the Air Force. Hughes won the radar avionics competition and Northrop won the Air Force prime contract on the B-2 Development Program.

11. In 1981, prior to Hughes receiving the B-2 radar subcontract, Air Force personnel examined the possibility of the B-2 radar employing components that would be common with other radars. They encouraged Northrop as well as its subcontractors to employ Commonality throughout the B-2.

12. On March 27, 1981, Hughes submitted its B-2 radar proposal to Northrop which stated that Hughes' design approach incorporated a "high degree of commonality with F-15 and F/A-18" data processing modules.

13. On August 14, 1981, the Air Force's technical advisor for avionics engineering, Ronald Longbrake, and the Air Force's chief engineer for the B-2, John Griffin, requested that Hughes submit a "Commonality White Paper" to identify and describe development efforts on the B-2 that could also be utilized for other concurrent radar programs.

14. Hughes' original B-2 technical proposal informed Northrop that Hughes believed that the B-2 radar could utilize certain radar components derived from other Hughes radar systems. Hughes described the possibility of using a Radar Data Processor ("RDP") unit that was similar to the one already in use in the F-18's radar.

15. Hughes' original B-2 technical proposal also described an Analog Signal Converter ("ASC") unit that could be derived

from the ASC developed in an earlier Hughes-funded demonstration project.

16. Hughes' technical proposal for the B-2 radar described conceptual approaches to meet the Air Force's performance specifications. The proposal did not represent a promise by Hughes to build the radar according to the configurations described in the proposal. It was understood by Hughes, Northrop and the Air Force that the design of the radar was entirely the prerogative and responsibility of Hughes; that design was required only to achieve the performance requirements of the subcontract within the size and weight constraints specified.

C. The B-2 Radar Subcontract

17. In December 1981, Hughes was notified that it had been awarded the B-2 radar subcontract. Northrop and Hughes executed a letter subcontract on March 8, 1982, and the subcontract was made definite between Hughes and Northrop on October 24, 1982. The subcontract was a cost-plus incentive fee type contract under which Hughes agreed to design and develop a complex, new radar for the B-2. In return, Hughes would be paid for all of its costs incurred for that effort, plus a fee or profit in an amount which would be reduced to a "floor" amount as the actual cost incurred for the effort exceeded the original estimate.

18. The B-2 radar subcontract specified the functions and technical performance requirements of the radar, but did not define or describe its configuration or the hardware to be used. The subcontract stated that the radar "will undergo technical definition, design, layouts, trade studies and development process in order to define the required weapon system."

19. Neither the March 8, 1982 letter subcontract nor the October 4, 1982 B-2 radar subcontract specified the hardware

to be used in the radar. The subcontract did not require use of the F-18's RDP or the particular ASC which were identified in Hughes' original B-2 proposal.

20. The October 4, 1982 B-2 radar subcontract provided that it "shall constitute the entire and complete agreement between the parties and shall supersede the Letter Subcontract, all prior correspondence and other communications, including the provisions of any Request for Proposals from Buyer or any Proposals from Seller."

21. There is no language in the B-2 radar subcontract that supports or that in any way could form the basis for the allegation in Schumer's complaint in paragraphs 16-18, that the B-2 radar subcontract specified or required the employment of "the existing Hughes F-15 APG-63 and F-18 radar processing modules."

D. The F-15 MSIP Program

22. The Air Force had begun discussions with McDonnell Douglass Corp. ("McAir") sometime in 1980-81 regarding upgrading and enhancing the existing F-15 aircraft, including its radar system. These upgrade efforts for the F-15 became designated as the "F-15 Multistage Improvement Program" or "F-15 MSIP." Hughes was the subcontractor selected to develop the F-15 MSIP's upgraded radar system. The F-15 MSIP radar development subcontract was issued in two stages.

23. The first stage of the F-15 MSIP contract effort started in June 1982, and the subcontract, Purchase Order E21009L, was formally issued to Hughes on November 4, 1982. This subcontract required Hughes to "initiate design and development" of an RDP.

24. None of the direct costs associated with the first F-15 MSIP subcontract were shared with any other program. There was no Commonality Agreement involving that subcontract;

none of the subcontract costs were charged to or allocated from any Commonality cost pools.

25. Schumer has admitted that he has no personal knowledge of any cost sharing involving the first MSIP subcontract.

26. On July 23, 1982, Hughes submitted its proposal for the second stage of the F-15 MSIP program. Hughes proposed a development effort which included the design and development of the advanced RDP begun under the first stage of the F-15 MSIP program. The second F-15 MSIP subcontract, Purchase Order E31011R, was awarded to Hughes on February 3, 1983.

E. The Air Force Encouraged Hughes to Develop a New Radar Data Processor which would be Common Between the B-2 and F-15 MSIP

27. Shortly after Hughes was awarded the B-2 subcontract, Hughes B-2 program manager, David Lynch, began a series of meetings with Northrop's radar manager, Robert Davis, the Air Force's technical advisor for avionics engineering, Ronald Longbrake, and the Air Force's avionics systems integration engineer, Terry Tucker, regarding:

(a) B-2's use of common radar hardware already in existence; and

(b) the possible development of new radar units in common with other Hughes radar development programs which were contemplated but not yet under contract, including the F-15 MSIP.

28. Originally, the B-2 mission was that of a high altitude airplane. Hughes' original suggestion to use the F-18's RDP was conceived with that mission in mind.

29. In late 1981-early 1982, the Air Force directed a change to the B-2's mission—the B-2 would fly at both high and low altitudes. This mission change had an impact on the B-2's

radar, including the performance requirements for the B-2's RDP. In order to accomplish the new performance requirements, the B-2's RDP needed increased processing capacity over and above that of the F-18's RDP which Hughes had originally suggested for use on the B-2.

30. In Spring 1982, Hughes discussed with Northrop and Air Force personnel the need to develop a new, advanced RDP with increased processing capacity. The Air Force determined that it would be advantageous if Hughes could develop advanced RDP that could be used in both the B-2 and the F-15 MSIP radars.

31. The change in the B-2's mission necessitated Hughes developing an advanced RDP. Had the F-15 MSIP program not already embarked on that development effort, the B-2 program would have had to fund the entirety of the advanced RDP itself.

32. The Air Force's technical advisor for avionics engineering, Ronald Longbrake, discussed RDP Commonality between B-2 and F-15 MSIP with the Air Force's chief engineer on the F-15, John Griffin.

33. The Air Force's avionics systems integration engineer, Terry Tucker, monitored the advanced RDP development effort undertaken on the F-15 MSIP program and was involved in fostering the RDP's Commonality between the B-2 and F-15 MSIP.

34. On December 7, 1982, Hughes gave a detailed oral and written presentation to Northrop regarding the B-2's use of common modules from the advanced RDP which were being developed for the F-15 MSIP radar. The presentation described benefits of RDP Commonality.

F. Disclosure of RDP Commonality Agreement

35. At the December 7, 1982 presentation, Hughes described to Northrop the following funding arrangements that would result from the B-2's utilization of modules common with the F-15 MSIP's RDP:

(a) Hughes would charge all of the development costs for common RDP modules and support software to the F-15 MSIP subcontract; and

(b) the development of modules and software that were unique to the B-2 would be charged to the B-2 subcontract.

36. The written briefing materials also informed Northrop that the cost sharing would be accomplished by a "Commonality Agreement with F-15 program."

37. On December 14, 1982, Hughes' program managers for the F-15 and B-2 executed a Commonality Agreement, entitled "Development of Advanced Radar Data Processor (RDP)." (This Commonality Agreement is identified as "Agreement 1" in Schumer's complaint.)

38. Consistent with what Hughes had informed Northrop at the December 7, 1982 briefing, the December 14, 1982 Commonality Agreement identified the software and the eight common modules for which F-15 would "continue funding all development efforts."

39. The December 14, 1982 RDP Commonality Agreement defined the "development" stage during which all of the costs associated with the Commonality efforts would be charged entirely to the F-15 MSIP subcontract:

> This effort shall include the generation and formal initial release of all production documentation such as drawings, test requirements, and associated test and diagnostic software for the above [common] modules.

Production drawing release is a formal sign-off procedure which reflects the completion of design development.

40. The December 14, 1982 RDP Commonality Agreement defined the point in time when certain costs associated with improvements and upgrades to the common modules would be shared equally between the B-2 and the F-15 MSIP programs:

> Subsequent to production drawing release, refinements/changes mutually agreed to by the using programs shall be funded on an equal basis. Changes to common hardware required by unique program requirements will be funded by that program.

The Commonality Agreement provided that manufacturing costs associated with the common RDP modules would be allocated to both programs based on the quantity of modules delivered to each program.

41. On January 23, 1983, Hughes' B-2 Program Manager David Lynch discussed the December 14, 1982 RDP Commonality Agreement with Northrop's radar manager, Robert Davis. On January 25, 1983, Mr. Lynch reviewed the terms of the Commonality Agreement with Mr. Davis and provided him with a copy of the Commonality Agreement.

42. Northrop's radar manager, Robert Davis, understood that Hughes had promised Northrop that Hughes' F-15 MSIP subcontract would bear all of the development costs of the common RDP modules up to the point of production drawing release, and thereafter, costs for improvements and upgrades that were common to both programs would be shared equally between the B-2 and the F-15 MSIP subcontracts.

43. On February 24, 1983, Northrop confirmed with Hughes that it concurred with Hughes' recommendation to change the RDP's configuration from a design derived from the F-18's RDP to a design that was undergoing development on the F-15 MSIP program. Northrop's approval of the change in the RDP's configuration did not establish any fixed price for the full scale development of the B-2 radar's RDP.

44. Northrop's and the Air Force's concurrence with the change in the RDP's configuration was based, in part, upon the disclosure to Northrop and the Air Force of the cost sharing arrangement between the B-2 and the F-15 MSIP subcontracts that was set forth in the December 14, 1982 RDP Commonality Agreement.

45. The December 14, 1982 RDP Commonality Agreement was re-executed by Hughes on June 24, 1983, but with no substantive changes made to the previous RDP Commonality Agreement. (This Commonality Agreement is identified as "Agreement 2" in Schumer's Complaint.) Hughes' B-2 program manager, David Lynch, provided Northrop's radar manager, Robert Davis, with a copy of the June 24, 1983 RDP Commonality Agreement shortly after the document was executed.

46. Consistent with the terms of the June 24, 1983 RDP Commonality Agreement, the costs incurred by Hughes for the design and development of the RDP modules that were common between the B-2 and the F-15 MSIP were charged directly and exclusively to the F-15 MSIP subcontract. None of these costs were charged to the B-2 subcontract.

47. As set forth in the RDP Commonality Agreement, the only RDP costs which were charged to Commonality pools and shared between the B-2 and the F-15 MSIP were for:

(a) improvements and upgrades to the design which were required by the B-2's scope of work, and

(b) the deliverable hardware received by the B-2.

48. On June 11, 1984, Hughes notified Northrop that most of the RDP design was completed. By the Fall of 1984, the first RDP hardware had been completed.

G. Development of the Gate Array Enhanced Analog Signal Converter began on the B-2 Subcontract

49. Hughes originally believed that the B-2 radar could utilize an ASC configuration that had been developed in the late 1970s and early 1980s under the auspices of the F-15 program and which had been funded with Independent Research & Development ("IR&D") and Hughes' company funds.

50. In early 1982, it became apparent to the Air Force that the weight of the B-2 aircraft would hinder its performance. Thus, Hughes directed its development efforts to find ways to reduce the overall weight of the B-2's radar.

51. To satisfy the B-2's performance specification and to help achieve weight reduction, Hughes changed the configuration of the ASC. Instead of placing the ASC in its own separate box, Hughes' new configuration relocated the ASC within another of the radar's boxes called the Receiver/Exciter.

52. The performance specifications required by the contract could be accomplished within this new configuration by using "gate array" technology. Gate arrays are silicon chips containing microtransistors that reduce the size of the component into which they are integrated.

53. On April 12, 1982, Hughes presented to Northrop its first configuration drawing of the ASC which would require the design and development of gate arrays.

54. On April 21, 1982, Hughes' B-2 program manager David Lynch gave a briefing to Northrop and the Air Force which described the new ASC configuration.

55. In 1982, when Hughes committed to design and develop the gate array enhanced ASC for the B-2 subcontract, Hughes had no other radar contract under which this effort had been authorized, and the F-15 customer did not authorize the gate array enhancements to the ASC until 1984.

56. Since the design and development of the gate array enhanced ASC was undertaken to satisfy the performance requirements of the B-2 subcontract, all of the costs incurred for that effort were properly chargeable to that subcontract.

H. Hughes did not "Double Price" the B-2's Gate Array Enhanced ASC on the F-15 MSIP Subcontract

57. In August 1982, as part of the first stage of the F-15 MSIP subcontract, Hughes presented McAir with a briefing on the status of the development of the MSIP radar. In the briefing, Hughes identified for McAir the study efforts it wanted to pursue for the ASC among which were "gate arrays for the digital logic to minimize power consumption/cooling requirements and hardware size."

58. Hughes' briefing materials informed McAir that Hughes was examining "other programs for parts commonality so as to minimize cost and schedule impact."

59. In November 1982, Hughes presented to McAir the results of its feasibility study in a design status review briefing that revealed the various advantages of incorporating gate array technology into the F-15 MSIP's ASC, such as: higher packaging density, reduced power needs and increased reliability resulting from fewer parts and improved circuit connections.

60. Hughes formally proposed to McAir the utilization of the gate array enhanced ASC for the F-15 MSIP radar for the first time on January 4, 1983. Since the gate array enhanced ASC was not required to meet the performance specifications of the F-15 MSIP radar, Hughes set forth its proposal as an option to the second F-15 MSIP radar subcontract.

61. Hughes' January 4, 1983 F-15 MSIP proposed option for the gate array enhanced ASC informed McAir that "[f]or the past year, Hughes has been evaluating gate arrays for use in Analog Signal Processors." The proposal went on to discuss that several suppliers of gate arrays had been evaluated already.

62. Hughes' January 4, 1983 F-15 MSIP proposal informed McAir that gate arrays for the ASC represented current research activity at Hughes on some other Hughes program that was not identified in the proposal. McAir's F-15 Radar Subsystem Manager, John R. Fahey, knew that another Hughes program was involved in the development of a gate array enhanced ASC.

63. On February 3, 1983, McAir awarded the second F-15 MSIP subcontract to Hughes. Because of funding limitations, McAir did not exercise the option for the gate array enhanced ASC.

64. On April 25, 1983, Hughes submitted to McAir a proposal again offering to McAir an opportunity to incorporate the gate array enhanced ASC into the F-15 MSIP radar subcontract.

65. Hughes' April 25, 1983 proposal to McAir was submitted in the form of an engineering change proposal (designated as RCP/CCP M001), for the incorporation of the gate array enhanced ASC for the F-15 MSIP radar.

66. On September 1, 1983, Hughes submitted to McAir its cost and pricing data in support of its proposal price for the

incorporation of the gate array enhanced ASC for the F-15 MSIP radar. Hughes' supporting data stated that the proposed cost "includes only those unique efforts to apply technology to F-15."

67. In the course of the negotiation process, Hughes submitted cost or pricing date to support the estimated labor hours and costs proposed to McAir. "Cost or pricing data" is that factual information that relates to the buyer's assessment of the reasonableness of the proposed price. The detailed backup data to the proposed price submitted to McAir during the negotiation process further stated that the engineering design hours used to calculate Hughes' price, "take into account commonality." This language together with the language in the January and September 1983 proposal documents made it clear to McAir that the F-15 MSIP subcontract would not bear the entire costs of the gate arrayed ASC development effort.

68. On January 13, 1984, McAir approved Modification 001 to the second F-15 MSIP subcontract authorizing the development of the gate array enhanced ASC, which had been proposed by Hughes in RCP/CCP M001.

I. B-2 Security Requirements Precluded Hughes from Directly Disclosing to McAir the Existence of the B-2 Program

69. Hughes was severely restricted from providing McAir or the Air Force's F-15 program office with any information regarding the B-2 program, which in 1983 was highly classified. Even the existence of the B-2 Bomber was classified, as was Hughes' relationship to the B-2 program. The B-2's security requirements precluded Hughes from mentioning the existence of the program to anyone who did not have the

required special access program clearance, which included all McAir personnel.

70. In January 1982, in order to foster Commonality between the B-2 and the F-15 MSIP without breaching the B-2s security requirements, John Griffin, who had been the Air Force's chief engineer on B-2 prior to becoming chief engineer on the F-15, became responsible for conferring with the Air Force's F-15 Program Office regarding radar commonality between the B-2 and the F-15 MSIP program.

71. In 1983, during the period in which Hughes was proposing to McAir the incorporation of the gate array enhanced ASC for the F-15 MSIP radar, the existence of the B-2 Bomber was still secret, as was Hughes' relationship to that program. The B-2 radar subcontract, along with the Security Requirements Manual which is still classified, required Hughes to take specific actions to preserve the secrecy of the B-2 program, including the use of "cover stories" to fool or confuse individuals not accessed to the B-2 program.

72. While Hughes was able to and did make vague references to McAir concerning another Hughes radar program that was developing the gate array enhanced ASC, Hughes could not provide McAir with any information which could lead McAir to speculate that Hughes was performing work on the highly classified B-2 project.

J. Hughes Established a Commonality Agreement to Share Costs for the Development of the ASC

73. During the B-2's System Design Review which occurred between March 31 and April 12, 1983, Hughes briefed Northrop and the Air Force regarding Hughes' proposal to McAir for the incorporation into the F-15 MSIP of the gate array enhanced ASC. Mr. Lynch pointed out that if Hughes could develop the gate array enhanced ASC so that a number

of common modules could be used in both the B-2 and F-15 MSIP radars, the government would accrue cost savings from the sharing of Hughes' development costs between the two programs, as opposed to each program paying 100% of a development effort. Hughes identified the B-2's ASC components and modules that it hoped could be made common with the F-15 MSIP radar.

74. In May 1983, prior to McAir's formal approval of the subcontract modification for the gate array enhanced ASC, Hughes began to incur costs in anticipation of McAir's approval. These "precontractual" costs were incurred at Hughes' own risk but were necessary to preserve the F-15 MSIP development schedule in view of what was believed to be the likelihood of approval by the Air Force and McAir of the subcontract modification. The "precontractual costs were at Hughes' own risk, in the sense that if McAir approved the modification, the costs could properly be charged to the F-15 MSIP subcontract; if McAir had not approved the effort, Hughes could not have charged the costs to the F-15 MSIP subcontract. Such precontract costs were incurred with the knowledge and assent of McAir.

75. On June 24, 1983, Hughes implemented a Commonality Agreement between the F-15 program and the B-2 program to establish "the funding responsibilities of each program as regards the development and fabrication tasks associated with the Analog Signal Converter."

76. The June 24, 1983 ASC Commonality Agreement provided as follows:

(a) the costs for design and development of ASC components that were common between the B-2 and F-15 MSIP would be shared equally between the two subcontracts;

(b) subsequent to production drawing release, costs for improvements and upgrades that were mutually agreed to by the two programs would be shared;

(c) the costs of performing any work in satisfaction of requirements that were unique to only one of the radar programs would be charged solely to that program;

(d) the costs of fabricating hardware would be shared on a pro-rated basis in direct proportion to the quantity of hardware delivered to each program;

(e) costs of test equipment and common software development would be shared by the two programs.

77. The June 24, 1983 Commonality Agreement was provided by Hughes to Northrop's radar manager, Robert Davis, shortly after it was executed.

78. In June 1983, Hughes established two Commonality pool (holding) accounts to collect costs associated with (a) the design and development of the ASC common modules, and (b) the fabrication of hardware. The costs collected in these Commonality pool accounts ultimately were allocated to the F-15 MSIP subcontract and the B-2 subcontract in accordance with the terms of the June 24, 1983 ASC Commonality Agreement.

K. Hughes Disclosed its Commonality Accounting Practices to the Government

79. In June 1983, Hughes created the Commonality pool accounts to collect the costs associated with the improvement/upgrade effort and hardware production of the common modules for the RDP. The pooled costs were then to be allocated to the B-2 and F-15 MSIP subcontracts in accordance with the terms of the June 24, 1983 RDP Commonality Agreement.

80. During the second half of 1983, the RDP was still undergoing development, the cost of which was charged directly to the F-15 MSIP contract. Therefore, the costs incurred in the RDP Commonality pools were minimal.

81. In November 1983, Hughes RSG's Controller, Joseph Rohlinger, notified the government's AFPRO office at Hughes of the RDP Commonality pool accounts. He further notified the government that Hughes was in the process of revising its CAS Disclosure Statement to describe the Commonality accounting practice for allocating common development costs.

82. Hughes' CAS Disclosure Statement, effective January 2, 1984, disclosed to the government the Commonality accounting practices for both Hughes' Manufacturing and Engineering Divisions:

> Direct labor cost incurred for engineering design, support and manufacture of common hardware is collected in a holding account and is allocated to contracts based on contemplated requirements.

L. Hughes Proposed Commonality for its F-14D Radar Development Subcontract

83. In 1984, the Navy contracted with Grumman Aerospace Corporation for an upgraded version of the F-14 aircraft, designated as the F-14D. Grumman's prime contract contained a provision entitled "Commonality" which specifically encouraged Grumman and its subcontractors to incorporate as many common components from other Navy aircraft as was practical. The provision further noted that "Commonality should reduce the initial cost of purchasing the component."

84. The Navy directed Grumman to procure the F-14D radar from Hughes. On June 21, 1984, Hughes and Grumman executed a Memorandum of Understanding under which

Hughes was to develop a new radar for the F-14D aircraft. The parties agreed that the subcontract would be a firm fixed price subcontract, with the final fixed price to be determined in subsequent negotiations.

85. The provision encouraging commonality in the Grumman prime contract from the Navy, also stated "[i]n order that the advantages of commonality on both programs can be maximized, the Navy desires to determine, at the earliest possible date, whether the MSIP radar being developed by the [U.S. Air Force] can be effectively utilized as an alternative for F14D radar upgrade called for under this contract." Thus, Grumman was directed by its contract with the Navy to pursue commonality with the advanced radar being developed by Hughes under the F-15 MSIP and B-2 contracts, although the participation of B-2 was unknown to Grumman at the time.

86. In June or July 1984, Hughes provided Grumman with a series of briefings to explain the radar components that were undergoing design and development at Hughes in connection with the F-15 MSIP contract, including the advanced RDP, RSP and ASC.

87. Because of the B-2's security restrictions, Hughes could not disclose to Grumman the existence of the B-2 program. Instead, Hughes disclosed to Grumman that the advanced RDP and gate array enhanced ASC were undergoing development as part of the F-15 MSIP program.

88. The development of the advanced RSP had begun in early 1982 using Hughes' company funds and Independent Research and Development funds. In January 1984, McAir had authorized Hughes to continue the development of the advanced RSP under the F-15 MSIP subcontract through its approval of RCP/CCP M001.

89. The B-2 radar subcontract did not require the use of the advanced RSP and there is no evidence it paid for or utilized that radar component.

90. After Hughes provided technical proposals to Grumman describing the advanced RDP, the gate array enhanced ASC, and the advanced RSP, Grumman and Hughes executed another Memorandum of Understanding on September 14, 1984 which directed Hughes to "proceed with the Full Scale Development (FSD) of the MSIP-Enhanced F-14D Radar System." The Memorandum further provided for "evaluation of the potential for effectively utilizing elements of the USAF [Air Force] F-15 MSIP radar upgrade as an alternative to the F-14D radar upgrade."

91. Grumman formally notified Hughes on September 21, 1984, that a contract modification would be prepared for the Navy's approval to authorize the "MSIP configuration" for the F-14D radar. In the meantime, this notification authorized Hughes to begin immediately incurring costs on the F-14D for incorporating the advanced RDP, the gate array enhanced ASC, and the advanced RSP into the F-14D's radar.

92. Grumman believed that utilizing the "MSIP technology" would (a) enhance Grumman's ability to comply with its delivery schedule; (b) enable Grumman to comply with the Commonality provision in its prime contract, and (c) reduce the overall cost to Grumman and the Navy. The Commonality provision contained in Grumman's prime contract with the Navy was included in Grumman's subcontract with Hughes.

M. Hughes' Commonality Agreements were Revised to Include the F-14D Subcontract

93. On February 8, 1985, Hughes' F-15, F-14 and B-2 program managers executed a revised Commonality Agreement which noted "[t]he initial development phase for the common

RDP hardware has been funded solely by the F-15 MSIP program and has been completed." (This Commonality Agreement is identified as "Agreement 4" in Schumer's complaint.)

94. The February 8, 1985 Commonality Agreement provided that funding for improvements and upgrades to the RDP's common hardware would be shared equally (1/3 each) among the B-2, F-15 MSIP and F-14D subcontracts.

95. The February 8, 1985 Commonality Agreement provided that costs for the design and development of common ASC components would continue to be shared equally between the F-15 MSIP and B-2 subcontracts and not charged to the F-14-D subcontract.

96. The February 8, 1985 Commonality Agreement provided that the costs of improvements and upgrades (i.e., following design and development) to the common ASC components that were authorized by the F-15 MSIP, B-2 and F-14D programs would be charged in equal thirds to those three subcontracts.

97. The February 8, 1985 Commonality Agreement stated that the advanced RSP was still undergoing development under the F-15 MSIP subcontract. Design and development costs would continue to be charged exclusively to the F-15 MSIP subcontract.

98. The February 8, 1985 Commonality Agreement provided that the costs of improvements and upgrades to the common RSP components that were authorized by the F-15 MSIP and F-14D programs would be shared equally by those two subcontracts.

99. Like the previous Commonality Agreements, the February 8, 1985 Commonality Agreement provided that the costs of fabricating common hardware would be shared between the three subcontracts on a prorated basis in direct

proportion to the quantity of hardware delivered under each subcontract.

100. The February 8, 1985 Commonality Agreement was provided by Hughes to Northrop. Both Northrop's radar manager, Robert Davis, and Northrop's subcontracts manager, Richard Blakeney, were provided with copies of this Commonality Agreement in February 1985.

101. On April 8, 1985, Hughes F-14 Contract Negotiator, Ben Kaufman, provided a copy of the February 8, 1985 Commonality Agreement to Grumman's subcontracts project manager, William Powers.

N. The Costs of Improvements and Upgrades to the Design of the Advanced RDP were Shared in Accordance with the Commonality Agreements

102. The February 8, 1985 Commonalty Agreement described an improvement/upgrade effort for the RDP, the cots of which would be charged to a Commonality cost pool and allocated in equal thirds to the F-15 MSIP, the B-2 and the F-14D programs.

103. The improvement/upgrade effort defined in the February 8, 1985 Commonality Agreement involved implementing a dual Central Processing Unit ("CPU") for the RDP—an effort that was required to meet the performance specifications of the B-2 radar. The dual CPU for the RDP had been authorized by Northrop for the B-2 radar in October 1984.

104. Since the dual CPU was required for the B-2, Hughes could have elected to charge the costs associated with that effort entirely to the B-2 cost reimbursement type subcontract. Instead, Hughes shared these costs with the F-15 MSIP and F-14D, both of which were fixed price type subcontracts.

105. There is no credible evidence that the costs incurred for the RDP improvement/upgrade effort were allocated in a manner inconsistent with the terms of the February 8, 1985 Commonality Agreement.

O. The June 19, 1985 Commonality Agreement Provided for the Sharing of Sustaining Engineering Costs

106. Following the initial design/development and the improvement/upgrade of the advanced RDP, the advanced RSP, and the gate array enhanced ASC, Hughes began to incur cots to "sustain" the common components. Sustaining engineering is the effort required to maintain or modify an already developed item during the period in which the item is being manufactured.

107. The "sustaining engineering" phase was defined in the June 19, 1985 Commonality Agreement. (This Commonality Agreement is identified as "Agreement 5" in Schumer's complaint.) This Commonality Agreement was provided by Hughes to Northrop in June 1985.

108. The June 19, 1985 Commonality Agreement provided that sustaining engineering costs for the common modules would be shared between the B-2, F-15 MSIP and F-14 programs. Sustaining engineering costs for components common to all three subcontracts were to be shared in equal thirds; components common to only two of the subcontracts were to be shared 50/50.

109. The sustaining engineering costs were allocated in accordance with the terms of the June 19, 1985 Commonality Agreement.

P. The Commonality Agreements were Disclosed to Grumman During the Course of Negotiations on the Final Price of the F-14D Radar Subcontract

110. In 1986, Hughes believed, based on information from the government, that it was then permissible under the B-2's security requirements to disclose to its F-15 MSIP and F-14D customers the Commonality Agreements and accounting procedures and that costs were being shared with an unidentified classified program.

111. On March 26, 1986, Hughes provided both Grumman and McAir with a briefing regarding Hughes' Commonality Agreements. The briefing included a presentation on Hughes' Commonality accounting procedures.

112. On December 8, 1986, Hughes executed and submitted to Grumman its "Certificate of Current Cost or Pricing Data" in connection with the parties' agreement on the price of the F-14D subcontract. Hughes' certificate listed the documents that represented Hughes' disclosure to Grumman of its cost or pricing data. Included in the list was Hughes' "Commonality presentation and other related Commonality documents provided to GASD [Grumman] on 26 March 1986".

113. The firm fixed price negotiated between Hughes and Grumman for the F-14D subcontract took into account the Hughes Commonality Agreements which affected the F-14D radar.

114. Schumer admits that he had no responsibility for or involvement with the F-14 program, never read any of the F-14 contracts, and never had any discussions regarding any of the issues involved in the case with any Grumman people on the F-14 program.

Q. Hughes' F-18 Subcontracts Shared Only Costs of Manufacturing and Sustaining Engineering.

115. Since the late 1970s, Hughes has produced radars for the F-18 aircraft pursuant to a series of annual radar production subcontracts with McAir. Since the time of Hughes' first

Commonality Agreement executed on March 24, 1978, the F-18 program has shared manufacturing costs associated with the common RSP components.

116. None of Hughes' Commonality Agreements provided for the sharing of any design and development costs with any F-18 subcontract, and, in fact, no such costs were shared by the F-18 with any other program.

117. The June 19, 1985 Commonality Agreement (described in ¶ 112 above) was revised by Hughes on May 8, 1987. (This revised Commonality Agreement is identified in Schumer's complaint as "Agreement 6.") Hughes' F-18 radar utilized one of the advanced RDP components—the firm memory module—that had been developed under the F-15 MSIP subcontract. Since that module thus became common among all four programs—F-15 MSIP, B-2, F-14D and F-18—the Commonality Agreement provided that all four programs would share in the sustaining engineering costs for that particular RDP component.

118. Schumer admits that he never worked on the F-18 program, never read any of the proposals or contracts, and does not know what was disclosed to McAir by Hughes about the cost-sharing involving the F-18.

II. CONCLUSIONS OF LAW

1. Fed. R. Civ. P. 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

2. A party moving for summary judgment and not bearing the burden of proof at trial need not negate the other party's case. Rather, the moving party may discharge its bur-

den by demonstrating the absence of an essential element of the case of the opponent, who bears the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

3. The test for determining whether a genuine issue of material fact exists is whether the evidence is sufficient to sustain a verdict for the nonmoving party. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986). The evidence is not sufficient to sustain a verdict for Schumer in this case.

4. Hughes did not knowingly present or cause to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval.

5. Hughes did not knowingly make, use, or cause to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.

6. Hughes did not conspire to defraud the Government by getting a false or fraudulent claim allowed or paid.

7. Schumer has not shown that Hughes violated the False Claims Act.

Dated: May 19, 1992

/s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge

EXHIBIT F

DEFENSE CONTRACT AUDIT AGENCY
WESTERN REGION
RESIDENT OFFICE
HUGHES CORPORATE OFFICE
P.O. BOX 92489 (S64/C130)
200 N. SEPULVEDA BLVD
LOS ANGELES, CA 90009-2489

IN REPLY REFER TO
4511/92I49100001/tn 10 July 1992

MEMORANDUM FOR DIVISIONAL ADMINISTRATIVE CONTRACTING OFFICER, DPRO HUGHES LOS ANGELES

SUBJECT: Determination of the B-2 and F-15 Disclosure Statement and CAS 401 Noncompliance Issue

Reference is made to your letter, dated 14 November 1991, and our Audit Report No. 4511-91B44200001-S1, dated 21 May 1991.

The contractor has demonstrated to us that if the commonality pooling concept had not been instituted, the B-2 cost-type contract would have incurred all the development costs associated with the gate array enhanced Analog Signal Converter (ASC). Incorporating the commonality pooling concept, allowed the F-15 fixed-price-incentive contract to share in the ASC's common development costs, which would have otherwise been fully charged tp[*sic*] tje[*sic*] B-2 contract. The B-2 contract would have incurred all the development costs, because the ASC's gate array technology was first

considered for incorporation into the B-2's radar system. Had the B-2 contract absorbed all these development costs, the government would had [*sic*] paid more for the gate array enhanced ASC.

The contractor has demonstrated to us that its bidding and accumulating of costs was in compliance with CAS 401 during the period of December 1982 through 2 January 1984. The contractor accumulated costs at a more detail level than it bid them in its proposals. The contractor's proposal for the B-2 did not bid at the level of detail that disclosed the pooling of common costs. After the definitization of the B-2 contract, communication between the contractor and its customer, Northrop Corporation, indicates that the customer was aware of the contractor's intent to develop common radar components. The contractor's cost ledger accumulated costs at a detailed level, by account, which were later allocated to final cost objectives according to commonality agreements. The standards allow the bidding of costs at a lesser level of detail than the accumulation of such costs. However, the contractor's practices were not disclosed and therefore not in compliance with its disclosure statement for the same period.

Since the noncompliance, as stated in our referenced audit report, had not revealed a significant cost impact, it is our opinion that the noncompliance us not material.

Any questions may be directed to the undersigned (310) 364-6500.

/s/ Jeffrey L. Mc Gowan
JEFFREY L. Mc GOWAN
Resident Auditor

EXHIBIT G

DEFENSE LOGISTICS AGENCY
DEFENSE CONTRACT MANAGMENT COMMAND
DEFENSE PLANT REPRESENTATIVE OFFICE HUGHES LOS ANGELES
P.O. BOX 92463
LOS ANGELES, CALIFORNIA 90008-2463

IN REPLY REFER TO
DCMDW-RKA 13 July 1992

Mr. Fred McNutt, Group Controller
Hughes Aircraft Company
Radar Systems Group
RE R01 12V09

Dear Mr. McNutt:

Reference is made to the following documents.

1. DCAA audit report #4511-91B44200001, dated 21 Nov 90 (allegation of disclosure statement noncompliance; commonality costs)
2. DCAA audit report #4511-91B4420000-S1, dated 21 May 91 (allegation of CAS 401 noncompliance; commonality costs)
3. DPRO letter to RSG, dated 25 Jul 91 (initial determination of CAS 401 noncompliance and request for cost-impact study)
4. RSG letter to DPRO, dated 30 Aug 91 (request for extension)
5. RSG cost-impact study, dated 8 Oct 91
6. DCAA Memorandum, dated 10 Jul 92

Based upon the DCAA findings under item (6), the CAS 401 noncompliance condition has been withdrawn. Additionally, DCAA has advised the DPRO that RSG's noncompliance with its disclosure statement during the period Dec 82 through Jan 84 is considered to have had an immaterial impact to then Government contract costs.

Based upon the preceding, no further action is required by RSG relative to the noncompliances referenced above.

Please direct any inquiries to Richard Marcantonio at (310) 364-6425 referencing our case #1F130063.

encl:
item 6

/s/ Brian F. Reilly
BRIAN F. REILLY
Divisional Administrative
Contracting Officer

cc:
HAC/Perlberg
DCAA/McGowan

Supreme Court, U.S.
FILED
APR 22 1996
CLERK

No. 95-1340

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

HUGHES AIRCRAFT COMPANY,
Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1340

HUGHES AIRCRAFT COMPANY,
Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

ARGUMENT

Petitioner Hughes Aircraft Company ("Hughes") asks this Court to review an interlocutory court of appeals decision remanding two claims for a trial on the merits. In a brave show, Hughes proffers no less than five circuit conflicts and three constitutional questions to support its dubious request. But as we show, in the end all that petitioner can muster is a disagreement between the Second and Ninth Circuits on one, technical statutory issue —an issue so narrow that it has arisen only once before in the ten-year history of the statute and that is not necessarily determinative even here. That, we submit, falls well short of a sufficient justification for invoking this Court's authority.

I. THE RETROACTIVITY ISSUE

Prior to October 27, 1986, the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* (the "FCA"), precluded courts from exercising jurisdiction over private enforcement (or "*qui tam*") actions where the action was "based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1983 ed.) (repealed 1986). In the False Claims Amendments Act of 1986 (the "1986 Amendments"), Congress relaxed this jurisdictional bar by making the "public disclosure" of the information in question—rather than mere government *possession* of that information—presumptively determinative of jurisdiction.[1]

Because the instant action was filed in 1989, almost three years after the 1986 Amendments were enacted, the Ninth Circuit decided the jurisdictional issue Hughes raised by applying those Amendments and sustaining jurisdiction here, even though the alleged false claims that give rise to this action were made before 1986. Hughes claims that there is a conflict in the circuits on the application of the 1986 Amendments' jurisdictional provisions in these circumstances. Petition ("Pet.") at 9.

This "conflict" is illusory: the decision below represents a straightforward application of this Court's comprehensive restatement in *Landgraf v. USI Film Products*, —— U.S. ——, 114 S. Ct. 1483 (1994), of the rules governing the effect of intervening changes in the law; and the one decision asserted to be in conflict with the decision below predates *Landgraf*, does not accord with

[1] The 1986 Amendments provide in pertinent part:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media unless . . . the person bringing the action is an original source of the information. [31 U.S.C. § 3730(e)(4)(A).]

the *Landgraf* method of analysis, and therefore is no longer authoritative. Quite aside from that, the question Hughes raises has, with the passage of time, become all but academic.

1. Prior to *Landgraf*, this Court had ventured what *Landgraf* termed "seemingly contradictory statements" as to the effect of intervening changes in the law. 114 S. Ct. at 1496. The Court had "noted the 'apparent tension'" but had "found it unnecessary . . . to resolve that seeming conflict" in pre-*Landgraf* cases. *Id.* (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990)).

In *Landgraf* the Court offered a clear synthesis of its prior decisions. Where a "new provision attaches new legal consequences to events completed before its enactment," that provision will not be applied retrospectively "unless Congress ha[s] made clear its intent" to do so. *Id.* at 1499. But where—as, for example, with "[c]hanges in procedural rules," *id.* at 1502—a new statute does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," *id.* at 1505, it is entirely appropriate to apply the new law to cases brought after its enactment, "even though that law was enacted after the events that gave rise to the suit." *Id.* at 1501.

Landgraf makes explicit that changes in jurisdictional rules, such as those worked by the 1986 Amendments at issue here, fall squarely within the latter category:

> Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. . . . We have regularly applied intervening statutes conferring or ousting jurisdiction, *whether or not jurisdiction lay when the underlying conduct occurred*[.] . . . Present law normally governs in such situations because jurisdictional statutes "speak to the power

> of the court rather than to the rights or obligations of the parties." *Republic Nat. Bank of Miami v. United States*, 506 U.S. [80], 113 S. Ct. [554,] 565 [(1992)] (Thomas, J., concurring). [*Id.* at 1501-02 (emphasis added).]

The Ninth Circuit's application of present law to determine jurisdiction here thus represents the most straightforward of applications of *Landgraf*.[2]

2. Because *Landgraf* "signalled a significant shift in the manner in which federal courts should analyze questions involving the application of new civil statutes to conduct that has already occurred," *Lindenthal*, 61 F.3d at 1407, it is clear that the Sixth Circuit's pre-*Landgraf* opinion in *United States v. TRW, Inc.*, 4 F.3d 417 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1370 (1994), on which petitioner bases its conflict-in-the-circuits claim, does not create a true conflict with the decision below.

TRW does not so much as discuss the question that the Court in *Landgraf* held to be critical to the analysis: namely, whether the new FCA jurisdictional provisions "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." 114 S. Ct. at 1505. Rather, the *TRW* court seized on one branch of the pre-*Landgraf* law and assumed that because the 1986 Amendments "expand the circumstances under which citizens may bring false claims suits," the Amendments "are not retroactive." 4 F.3d at 422-23. Because the *TRW* court failed to anticipate *Landgraf*, no appellate or district court has followed *TRW* since *Landgraf*, and no court is likely to do so.[3]

[2] As the Ninth Circuit explained in *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1408 (9th Cir. 1995), *cert. denied*, —— S. Ct. ——, 64 U.S.L.W. 3639 (Mar. 25, 1996) (No. 95-1167), which the court below followed, the provision at issue here "fits this [the *Landgraf* jurisdictional] paradigm precisely: [the provision] does not impair any rights [defendant] had when it acted, nor did the provision increase [defendant's] liability for past conduct, or impose new duties"; rather it simply eliminated "a jurisdictional defense to an action brought by a qui tam relator, as opposed to an action brought directly by the government." *Id.*

3. Apart from this, the question of the effect of the 1986 Amendments on pre-1986 false claims is, at this late date, all but certainly a purely academic one. The FCA has a six-year statute of limitations which can be tolled, but cannot be extended beyond ten years. 31 U.S.C. § 3731(b). By the time this Court could render a decision in this case, all pre-Amendments false claims would be more than ten years old, and any new FCA suit based upon such claims would be time barred.

II. THE PUBLIC DISCLOSURE ISSUE

Under the 1986 Amendments, an FCA suit is jurisdictionally barred if (1) there has been "public disclosure" of the underlying allegations or transactions in, *inter alia*, an "administrative . . . report, hearing, audit or investigation"; (2) the suit is "based upon" such public disclosure; and (3) the relator was not "an original source of the information." 31 U.S.C. § 3730(e)(4)(A). Hughes claims that "the courts of appeals are divided" in their manner of applying the first part of this three-part test, *viz.*, the part pertaining to "public disclosure." Pet. at 11. As we proceed to show, except with respect to one narrow and highly technical question, Hughes is mistaken.

1. Hughes first claims there is a conflict between the circuits as to whether an "administrative report" that is "available" under the Freedom of Information Act

[3] The first post-*Landgraf* decision, *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 907 F. Supp. 1349 n.4 (N.D. Cal. 1995), expressly declined to follow *TRW* because it found the decision no longer authoritative in the wake of *Landgraf*. The only other court, other than the Ninth Circuit, to face the issue post-*Landgraf*, *United States ex rel. Milam v. Regents of Univ. of Cal.*, 912 F. Supp. 869, 881 (D. Md. 1995), simply ignored *TRW*.

("FOIA"), 5 U.S.C. § 552, is, solely by virtue of that fact, "publicly disclosed" within the meaning of the FCA —"regardless of whether a member of the public *actually* requests and receives" that report. Pet. at 16-17 (emphasis in original). Hughes claims that *United States ex. rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991), which was followed in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1992), *cert. denied*, 508 U.S. 973 (1993), answered that question in the affirmative and thus conflicts with the Ninth Circuit's decision below. Hughes is mistaken.

To begin with, neither *Stinson* nor *Kreindler* involved, or even discussed, the question of "availability" under FOIA. In each case, the public disclosure question arose because, in the course of civil discovery in a suit which had antedated the FCA action, there had been an *actual* disclosure of certain documents, and the relators in the subsequent FCA suit (who were the counsel in the prior case) had based their FCA suit on the information that had come to their attention through those disclosed documents. The issue in those cases was whether such *actual* disclosure of documents to a party in the course of discovery—but not otherwise—constitutes "public disclosure" within the meaning of the FCA. Each court answered that question in the affirmative.

Neither *Stinson* nor *Kreindler* so much as hints that the result would have been the same were the documents at issue merely *discoverable* rather than actually *discovered*, *i.e.*, if the documents had been placed in a file and would have been *subject to disclosure* in the event of a hypothetical discovery request. To the contrary, the *Stinson* court specifically stated:

> We have given a practical, commonsense interpretation to "public disclosure," one that distinguishes between *information hidden in files* or disclosed in private and *information produced* pursuant to the discovery process which is presumptively, absent a court order, available for filing and general use. [*Id.* at 1161 (emphasis added).][4]

Stinson and *Kreindler* thus do not stand for the proposition that documents are "publicly disclosed" merely because they may (or may not) be available under FOIA, or in discovery. Indeed, such a rule would be unworkable as a practical matter since, given FOIA's multiple exemptions, *see* 5 U.S.C. § 552(b), it cannot be determined that a document is "available" under FOIA unless and until a member of the public actually "requests and receives" the document. Moreover, Hughes' "potential availability" theory is thoroughly at odds with the 1986 Amendments, whose very premise is that, because "government possession" of information about a fraud does not adequately ensure that the fraud will be redressed, such possession cannot, without more, jurisdictionally bar a *qui tam* suit. The Ninth Circuit's rejection of petitioner's potential availability theory—and the court's insistence on an actual disclosure—thus creates no discord in the circuit court law.

2. Hughes is thus left with but one sub-issue, pertaining to when an actual disclosure becomes a "public" dis-

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[4] The court in *Stinson* did hold that *one* of the reasons that the disclosure of documents pursuant to the discovery request at issue there was a "public" disclosure was that the disclosure was to "a party who [was] not under any court imposed limitation as to its use" and that the documents were therefore "potentially accessible to the public." 944 F.2d at 1158. Hughes seizes on the phrase "potentially accessible to the public" to argue that this was the *Stinson* court's *entire* test for "public disclosure." In fact, however, the court held that the documents had to meet *two* separate conditions: *first*, the documents had to be *disclosed to a member of the public* prior to the time of the *qui tam* suit; and, second, the documents had to be disclosed under circumstances in which (unlike in the case, for example, of a disclosure covered by a protective order) *other* members of the public could also have lawfully obtained and made use of the documents. By ignoring the first condition, Hughes misconceives the *Stinson* court's holding.

closure, on which there is disagreement in the lower courts. The Second Circuit in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322 (2d Cir. 1992), held that a disclosure of information limited to the employees of a contractor that has been implicated in wrongdoing constitutes a public disclosure, as long as the disclosure is made to "innocent" employees, *i.e.*, employees who had not previously been aware of the facts disclosed. The court below disagreed, ruling that it would be inconsistent with Congress' purpose of encouraging employees and other "insiders" to come forward with such information to hold that a disclosure of the documents to the contractor's employees raises the jurisdictional bar to subsequent *qui tam* actions. Appendix ("App.") at 11a.[5]

The Ninth Circuit's ruling on this point will be determinative of FCA jurisdiction only in an exceedingly narrow class of cases: those in which (i) evidence of false claims is disclosed to employees of a contractor whose billings to the government are at issue; (ii) the employees to whom disclosure is made are "innocent" employees with no prior knowledge of the facts disclosed; (iii) no other disclosure occurs; (iv) suit is brought based upon the disclosure to the innocent employees; and (v) the relator is not the original source of the allegations.

[5] The Ninth Circuit reasoned as follows:

> Unlike others who come across information related to fraud, an "innocent employee who comes forward with allegations of fraud by the employer knows that her job may be in jeopardy." *Doe*, 960 F.2d at 325 (Walker, J., dissenting). Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure. [App. at 9a.]

Applying that reasoning here, the court held that the disclosure of the audit reports to certain employees of Hughes and of Northrop Corporation, the prime contractor on Hughes' B-2 project, was not a "public disclosure," because the allegations in the report could "reflect negatively" on Hughes and Northrop. App. at 9a.

It is not even clear whether the instant case falls within this class and hence whether the "innocent employee" issue is dispositive even in this case: because the appellate court held that the disclosure of the audit reports to innocent employees was not "public disclosure," it did not reach plaintiff's alternative contentions that his suit was not "based upon" any such disclosure; and that he is an "original source" of the information in the reports. App. at 14a.

Be that as it may, it suffices for present purposes that the difference between *Doe* and the decision below is on a highly technical issue of statutory construction under a federal law which, according to Hughes' own admission, *see* Pet. at 7, has generated, on average, only about 100 cases per year. The significance *vel non* of this issue is perhaps best measured by the fact that, so far as we are aware, *Doe* and the instant case are the *only* two cases, in the decade since the 1986 Amendments were enacted, in which the issue of "innocent employee" disclosure has been decided.[6]

Should this issue somehow assume greater importance in the future, there will be time enough then for this Court to decide the question, including even in *this* case once a final judgment is entered. At this time, however, there plainly is no reason for this Court to grant certiorari to decide this issue.

III. THE "INJURY TO THE PUBLIC FISC" ISSUE

After sustaining its jurisdiction in this case, the court of appeals held that there was a genuine issue of material

[6] In an effort to make the issue appear worthy of this Court's review, Hughes claims that the court below held that, in order for a disclosure to qualify as a "public disclosure," the disclosure must be to "the public at large." Pet. at 12 (internal quotations omitted). *See also* Pet. at 13 (claiming that court below held that disclosure must be to the "*general* public" in order to qualify) (emphasis in original). Tellingly, Hughes does not cite to the opinion below when it makes these assertions, because nothing in the opinion supports them.

fact as to whether Hughes, in securing payment for its work on developing radar for the B-2 aircraft, had adequately disclosed (1) to Northrop Corporation, the prime contractor on the B-2, and (2) to the government in its disclosure statement, Hughes' method of allocating costs as between its cost-plus contract with Northrop and its fixed-price contract with McDonnell-Douglas for developing radar for the F-15 aircraft. Because these inadequate disclosures "creat[ed] a substantial issue as to the reasonableness of allowing the . . . charges," App. at 19a, and "may have rendered the costs unallowable," *id.* at 25a, the appellate court held that there was a triable issue as to whether the claims that Hughes had submitted for payment were "false claims" within the meaning of the FCA for which Hughes would be liable for a civil penalty of $2,000 plus "an amount equal to 2 times the amount of damages the Government sustains." 31 U.S.C. § 3729 (1983 ed.).[7]

The court of appeals went on to state that although Hughes' "noncompliance" with the disclosure require-

[7] Hughes dedicates two pages of its petition to challenging the Ninth Circuit's ruling that plaintiff's submission, in its opposition to Hughes' summary judgment motion, of materials establishing the inadequacy of Hughes' disclosure statement should have been "treat[ed] . . . as a request to amend the pleadings." App. at 22a-23a. But Hughes has not even stated the issue as one of its "Questions Presented," nor is the issue fairly encompassed within any of those Questions. *See* Pet. at (i). Thus, the issue is not properly before the Court. *See* Supreme Court Rule 14.1(a).

In any event, the Ninth Circuit's holding on this point is consistent with hornbook law and the law of other circuits. *See* 6 J. Moore, *Moore's Federal Practice* ¶ 56.10 (2d ed. 1988) & cases cited therein ("it is often . . . desirable to treat the pleading as though it were amended to conform to the facts set forth in the affidavits" in opposition to a summary judgment motion). And the statement in the principal Seventh Circuit case on which Hughes relies to claim a conflict, *Pritchard v. Rainfair, Inc.*, 945 F.2d 185, 191 (7th Cir. 1991), has been subsequently repudiated by that very court as erroneous dicta. *See Teumer v. General Motors Corp.*, 34 F.3d 542, 547 (7th Cir. 1994).

ments may have "had an 'immaterial impact' on costs, the lack of a determination of actual harm from the . . . violation does not preclude a claim under the FCA." App. at 25a. Hughes takes issue with this statement, and, once again, mistakenly claims that the Ninth Circuit created a conflict.[8]

1. As Hughes ultimately concedes, the law is clear "that the Government"—and hence a *qui tam* relator standing in the shoes of the Government—"need not prove 'actual' or 'specific' damages to recover under the FCA." Pet. at 21. That conclusion is compelled by this Court's decision in *Rex Trailer Co. v. United States*, 350 U.S. 148, 152-53 & n.5 (1955), holding under a statute that the Court called "essentially the equivalent of" the FCA that "the fact that no damages are shown is not fatal."[9]

At the same time, to be actionable under the FCA a false submission must cause some "injury" to the Government. *United States v. Halper*, 490 U.S. 435, 445-46 & n.6 (1989). *Halper* makes clear that the concept of "injury" is broader than "damages" and includes such elements as the "investigative . . . costs" caused by a false statement or even the intangible injury to the integrity of a government program. *Id.*

Injury of the type required by *Halper* is plainly present here, since, *inter alia*, Hughes' violation of federal

[8] In the proceedings before the Ninth Circuit, Hughes did not raise at any time the issue of whether harm to the government is an essential element of an FCA cause of action. The issue was not even raised in its petition for rehearing before that court.

[9] The courts of appeals have had no difficulty in concluding, based on *Rex Trailer*, that damages need not be proven to recover under the FCA. *See United States v. Hughes*, 585 F.2d 284, 286 n.1 (7th Cir. 1978); *United States v. Ridglea State Bank*, 357 F.2d 495, 497 (5th Cir. 1966); *Fleming v. United States*, 336 F.2d 475, 480 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965); *United States v. Tieger*, 234 F.2d 589, 590 (3d Cir. 1956), *cert. denied*, 352 U.S. 941 (1956).

accounting disclosure regulations forced the government to undertake a lengthy investigation, App. at 3a, and, as the Court of Appeals specifically noted, may have resulted in the payment of unreasonable or even unallowable claims. *Id.* at 19a, 25a. The court of appeal's dictum to the effect that it was not necessary to prove "actual harm" (in the form of an "impact on costs" charged to government contractors) in no way suggests that the court below intended (or could have intended) to dispense with the "injury" requirement.

2. Of the cases on which Hughes premises its claim of a conflict, only one even dealt in any way with the "injury" requirement.

In *United States v. Azzarelli Constr. Co.*, 647 F.2d 757 (7th Cir. 1981), the false claims were made to a state agency and affected how much the state paid those making the claims, but had no conceivable impact on the federal government, because the federal obligation was fixed regardless of the state's costs. For that reason, the Seventh Circuit dismissed the action. In so doing the Seventh Circuit reaffirmed "the need to establish an injury," *id.* at 762, but went so far as to suggest that this requirement can be met if a false statement "is *capable* of causing an injury to the funds or property of the United States if the claim is in fact paid." *Id.* at 759 (emphasis added). The instant case thus presents a far stronger case of "injury" than did *Azzarelli*, and there is no basis for Hughes' claim of a conflict between the two.[10]

[10] The other cases that Hughes claims to be in conflict with the decision below are even less on-point than *Azzarelli*. In *United States v. American Heart Research Found., Inc.*, 996 F.2d 7 (1st Cir. 1993), the defendant fraudulently paid the government less postage than the government was due; the court dismissed the suit not because the government was not injured by the fraud (it plainly was), but because, under the pre-1986 version of the FCA that governed the claims at issue there, *underpaying*—as opposed to *overcharging*—the government was not defined to be an actionable "false claim." *Id.* at 8. In *United States ex rel. Glass v. Medtronic, Inc.*, 957 F.2d 605 (8th Cir. 1992), the court held that the defendant did not violate any regulations, make any false statements, or do anything else wrong; thus, the court never even *reached* the issue of damage or injury.

IV. THE CONSTITUTIONAL QUESTIONS

While claiming that the statutory issues here are determinative and that this case presents no occasion for deciding any constitutional question, Hughes also contends that the decision below upholding the constitutionality of the *qui tam* provisions of the FCA raises no less than three "constitutional questions of the first order." Pet. at 22. Yet again, Hughes is mistaken.

As this Court observed over fifty years ago, "Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943) (citations and internal quotations omitted). The validity of such statutes has long been assumed; indeed in *Marcus* this Court stated, albeit in dictum, that "Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it." *Id.* at 542.[11]

Until recently, no one had so much as questioned the constitutional validity of such statutes. In the past few years, however, it has become standard fare in FCA actions for the defendant to assert that the *qui tam* provisions are unconstitutional.

Such a claim was first raised in *Kreindler*, *supra*, and was unanimously rejected by the Second Circuit. The

[11] *See also Adams v. Woods*, 6 U.S. (2 Cranch) 336, 340 (1805) (Marshall, C.J.) (ruling on the merits of a *qui tam* action without questioning the Article III power to do so); *Marvin v. Trout*, 199 U.S. 212, 225-26 (1905) (rejecting substantive due process challenge to a state law requiring owner of gambling establishment to pay forfeiture to person not injured by the gambling, because to do so "would be in effect to hold invalid all legislation for providing proceedings in the nature of *qui tam* actions").

constitutionality of the *qui tam* provisions was next raised in the Ninth Circuit in *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994). *Kelly*, also a unanimous decision, rejected precisely the arguments raised by Hughes here.[12] This Court denied certiorari in *Kelly* on February 22, 1994. 114 S. Ct. 1125.

Since the constitutional issues petitioner tenders here are the very same issues that were raised in *Kelly*, the Ninth Circuit, in its opinion below, decided those issues here on the basis of its earlier decision in *Kelly*. The only relevant event since the denial of certiorari in *Kelly* is that two additional circuits have joined the Second and Ninth Circuits in upholding *qui tam* provisions. *See United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994) (FCA); *United States ex rel. Hall v. Tribal Dev. Corp.*, 49 F.3d 1208, 1213 (7th Cir. 1995) (1832 statute pertaining to contracts with Indians). Hughes' assertion that the constitutional issues "remain[] unsettled," Pet. at 22, is thus made up out of whole cloth.[13]

[12] *Kelly* disposed of the separation-of-powers issue on the basis of *Morrison v. Olson*, 487 U.S. 654 (1988), reasoning that the Justice Department's ability to take over and dismiss a relator's suit, *see* 31 U.S.C. § 3730(c)(2)(A), gives the Executive Branch far greater control over *qui tam* relators than over the independent, court-appointed prosecutors whose authority was upheld in *Morrison*. *Kelly* found *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890), dispositive of the Appointment Clause issue, as that case teaches that a person having a position "without tenure, duration, continuing emolument or continuous duties" is not an "Officer of the United States" within the meaning of the Appointments Clause. And *Kelly* found no Article III defect when the government effectively assigns its claims to *qui tam* plaintiffs who, by virtue of the bounty they can recover, have a personal stake in the outcome. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 (1992) (finding that plaintiff lacked standing, but distinguishing "the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit, by providing a cash bounty for the victorious plaintiff").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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[13] Lacking support in any of the decided cases, petitioner strains to rely on a memorandum written in 1989 by then-Assistant Attorney General William P. Barr urging the Attorney General to challenge the constitutionality of the *qui tam* provisions of the FCA. *See* Pet. at 22-23. The relevance of this memorandum escapes us, especially since (1) Attorney General Thornburgh, to whom the memorandum was addressed, did not accept the recommendation and thus the Justice Department at that time took no position on the constitutionality of the provisions at issue here; (2) the memorandum itself states that agencies within the Justice Department at that time were of two minds and that then-Solicitor General Kenneth W. Starr was of the view that the *qui tam* provisions *are* constitutional; and (3) the Justice Department has subsequently resolved that internal division and concluded that the provisions are constitutional. *See* Brief for Intervenor United States of America in *United States ex rel. Pitt v. FD Services, Inc.*, No. 94-2496 (4th Cir.) (pending).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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6 J. Moore, *Moore's Federal Practice* ¶ 56.10 (2d ed. 1988) 7
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Respondent Schumer struggles mightily to explain away the various circuit splits identified in Hughes' petition, but those efforts are ultimately in vain. As Schumer concedes, at the very least the decision below squarely conflicts with the Second Circuit's decision in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992). That concession comes as no surprise, as the court below could hardly have been more explicit in rejecting the Second Circuit's interpretation of the False Claims Act ("FCA"). *See* App. at 11a ("[W]e reject the *Doe* court's definition of 'public disclosure,' which forecloses many insiders from bringing *qui tam* actions."); *id.* at 9a ("We decline to adopt the rule of *Doe* for application in this circuit."). Had this case been brought in the Second Circuit, in other words, it would have been dismissed for lack of jurisdiction; because it was brought in the Ninth, it lives on.

Nonetheless, Schumer insists that neither the "public disclosure" issue nor any of the other issues raised in the petition warrant review. He is wrong.

I. THE JURISDICTIONAL ISSUES

A. The Retroactivity Issue

Schumer does not deny that, but for the 1986 FCA amendments, this action would have been barred outright. Nonetheless, he doggedly defends the Ninth Circuit's remarkable conclusion that those amendments did not "impair any rights [Hughes] had when it acted, nor . . . increase [Hughes'] liability for past conduct, or impose new duties." Opp. at 4 n.2 (quoting *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1408 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1319 (1996)). It is, to put it mildly, not obvious how the elimination of an absolute defense does not "impair" a *qui tam* defendant's substantive rights.

That is precisely why the Sixth Circuit refused to apply the 1986 FCA amendments retroactively in *United States v. TRW, Inc.*, 4 F.3d 417 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1370 (1994). Schumer, however, asserts that the conflict between

the decision below and *TRW* is "illusory," Opp. at 2, because *TRW* was decided before this Court's decision in *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1499 (1994). According to Schumer, *Landgraf* marked a "'significant shift'" in the law of retroactivity, Opp. at 4 (quoting *Lindenthal*, 61 F.3d at 1407), that the *TRW* court simply "failed to anticipate," Opp. at 5.

The conflict is real. Schumer's revisionist analysis conveniently overlooks the point that *Landgraf* reaffirmed traditional retroactivity principles, including the principle permitting retroactive application of provisions that are purely procedural and do not impair substantive rights. *See* 114 S. Ct. at 1501-02. The *TRW* court simply applied these settled principles in refusing to apply the 1986 FCA amendments retroactively, noting that they "expand the circumstances under which citizens may bring false claims suits." 4 F.3d at 422. Nothing in *Landgraf* undermines that conclusion, as underscored by this Court's denial of *certiorari* in *TRW* less than one month before announcing *Landgraf*. *See* Pet. at 10 n.2.[1]

B. The "Public Disclosure" Issue

In its petition, Hughes presented two distinct grounds why Schumer's *qui tam* action should be dismissed even under the terms of the FCA as amended in 1986: *first*, the Government's disclosure of the alleged accounting irregularities to Hughes' and Northrop's "innocent employees" constituted "public disclosure" as a matter of law, *see* Pet. at 11-15, and *second*,

[1] Schumer also dismisses the retroactivity issue as "purely academic," Opp. at 5, on the theory that present and future cases are likely to involve conduct occurring *after* the 1986 amendments. By definition, of course, the number of cases involving retroactive application of a new law will dwindle over time. Schumer, however, does not deny the existence of pending cases raising the FCA retroactivity issue, *see* Brief of *Amici Curiae* Chamber of Commerce *et al.* at 6-7, or the need for further guidance in this jurisprudentially chaotic area.

the availability of information regarding those alleged irregularities to the public under the Freedom of Information Act ("FOIA") also constituted "public disclosure" as a matter of law, *see id.* at 16-18.

1. Disclosure to "innocent employees"

Because he cannot plausibly deny the acknowledged split between the Second and Ninth Circuits on the "innocent employee" issue, Schumer attempts to downplay the issue's significance. While his eagerness to avoid this Court's review may be understandable, his arguments in favor of allowing the split to fester are not.

Inexplicably characterizing the interpretation of the term "public disclosure" in the FCA as "a highly technical issue of statutory construction," Opp. at 9, Schumer insists that the circuit split is too trivial to warrant this Court's consideration, *see id.* at 1, 7-9.[2] The "innocent employee" issue arises, he asserts, only in an "exceedingly narrow class of cases." *Id.* at 8. That assertion cannot withstand even casual scrutiny.

As Hughes observed in its petition, the practical implications of the decision below are staggering: whenever a government audit or investigation suggests any irregularity, a contractor's "innocent employees" will be free to file lucrative *qui tam* suits based on information obtained from the Government.[3] The Ninth Circuit acknowledged this potential for abuse, but

[2] Schumer also resorts to the less-than-subtle tactic of reordering Hughes' two distinct "public disclosure" arguments and then describing the "innocent employee" argument as a "sub-issue" of the FOIA argument. Opp. at 7. Indeed, not content merely to reorder the arguments, Schumer brazenly asserts that *Hughes itself* adopted that order. *Compare* Opp. at 5 (asserting that Hughes "first" raised the FOIA, and then the "innocent employee," argument) *with* Pet. at 11-18.

[3] The decision's implications are particularly dramatic in light of the Ninth Circuit's further holding that *no showing of injury to the public fisc* is necessary to establish a cause of action under the FCA. *See* App. at 25a.

breezily observed that contractors will face only "a single lawsuit in each instance, since the first filing would constitute public disclosure sufficient to bar other claims based upon the audit." App. at 11a. By thus allowing "innocent employees" to file avowedly parasitic lawsuits, the Ninth Circuit has established itself as a magnet for *qui tam* relators.

Indeed, Schumer's assertion that the decision below is insignificant is perhaps most obviously belied by the two briefs *amici curiae* filed on Hughes' behalf by potential FCA *qui tam* defendants. Those *amici*, unlike Schumer, do not have the luxury of rosily discounting the enormous practical implications of this case. They are well aware of the oncoming deluge of *qui tam* litigation if the decision below is allowed to stand.

Finally, Schumer asserts that review of the Ninth Circuit's interpretation of "public disclosure" is unwarranted because the issue is "not necessarily determinative even here." Opp. at 1. In support of that remarkable assertion, Schumer speculates that the Ninth Circuit might instead have reached the same result on the ground that (i) the action is not "based upon" any such disclosure, or (ii) Schumer is an "original source" of the allegations of misconduct. *See* Opp. at 9.

Such speculation is preposterous. Schumer cannot, and does not, contend that the court below rested its holding on alternative grounds. To the contrary, he concedes that the Ninth Circuit *expressly declined to reach* either the "based upon" or "original source" issues in light of its conclusion that no "public disclosure" had occurred as a matter of law. *See* Opp. at 9, App. at 14a. A prevailing party cannot insulate a decision from review by simply asserting that he might have prevailed on other grounds instead.

2. Disclosure through FOIA

Schumer abandons any pretense of arguing that "public disclosure" can take place when documents are made *available* to the public; rather, he insists that "public disclosure" cannot

take place until a member of the public *actually obtains* the documents. *See* Opp. at 5-7. Schumer's candid disavowal of the availability theory is at least a refreshing contrast to the Ninth Circuit's obfuscatory approach: while purporting to accept the premise that documents are "publicly disclosed" when made *available* to the public, the court below simply asserted a distinction between "actual" and "potential" availability, and held that a document is not "publicly disclosed" until it is "actually available"—*i.e.*, until it is *actually obtained* by a member of the public. App. at 13a.

Schumer's brief, accordingly, underscores rather than reconciles the circuit split identified in the petition. Both the Second and Third Circuits have recognized that "public disclosure" occurs whenever a document is available to the public, *regardless* of whether a member of the public actually obtains it. *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1159 (3d Cir. 1991); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1158 (2d Cir.), *cert. denied*, 508 U.S. 973 (1993). Application of the availability theory adopted in those cases would readily lead to the dismissal here: Schumer does not deny that the relevant documents here were available to him under FOIA at the time he filed his suit. (Indeed, he could scarcely deny the point, as he *himself* actually obtained the documents under FOIA after filing this suit.)

Schumer, however, attempts to deny the circuit split by essentially writing the availability theory off the books. Thus, he insists that *Stinson* and *Kreindler* did not involve availability at all, but rather "actual disclosure." *See* Opp. at 6-7; *but see* Opp. at 7 n.4. Even the Ninth Circuit, however, was candid enough to acknowledge that its rejection of "potential" availability conflicted with *Stinson*, and rejected that case insofar as it held that a "public disclosure" of information could take place before a member of the public actually obtained that information. *See* App. at 12a ("[W]e reject the

rationale of *Stinson* to the extent that it comes to an opposite conclusion.").

II. THE "PUBLIC FISC" ISSUES

A. The *De Facto* Amendment Issue

Perhaps the most far-fetched assertion in Schumer's brief is that this Court is precluded from considering Hughes' challenge to the Ninth Circuit's rule of *de facto* amendment because that issue is not specifically set forth as an independent ground for review in the "Questions Presented" in the petition. *See* Opp. at 10 n.7. While acknowledging that Hughes "dedicate[d] two pages of its petition" to presenting this issue, *id.*, Schumer insists that "the issue is not properly before the Court," *id.*

It is well-established, however, that a petitioner need not set forth a separate question with respect to each and every theory on which it seeks review. To the contrary, this Court's Rule 14.1(a) specifies that the questions presented must be "short" and "concis[e]," and that "[t]he statement of any question presented is *deemed to comprise every subsidiary question fairly included therein.*" S. Ct. Rule 14.1(a) (emphasis added).

To minimize the number and complexity of the questions presented, Hughes decided not to break the *de facto* amendment issue into a separate question, but to treat it as a subsidiary aspect of the "public fisc" issue. As the petition explains: *"Before addressing th[e] [public fisc] holding . . . it is first necessary to address the Ninth Circuit's preliminary procedural ruling"* on *de facto* amendment. Pet. at 18 (emphasis added). Hughes' determination that the *de facto* amendment issue is subsumed within the "public fisc" issue has abundant support in this Court's precedents. *See, e.g.*, *Missouri v. Jenkins*, 115 S. Ct. 2038, 2047 (1995); *Lebron v.*

National R.R. Passenger Corp., 115 S. Ct. 961, 965 (1995); *cf. Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990).[4]

Turning to the merits of the *de facto* amendment issue, Schumer attempts to pass off the holding below as "consistent with hornbook law and the law of other circuits." Opp. at 10 n.7. Not so. The Ninth Circuit did not hold that the district court had *discretion* to treat the new allegations in Schumer's opposition to summary judgment as a *de facto* amendment of his complaint, but that the court was *required* to do so. *See* App. at 22a-23a. The "hornbook law" cited by Schumer, *see* Opp. at 10 n.7 (quoting 6 J. Moore, *Moore's Federal Practice* ¶ 56.10 (2d ed. 1988)), in no way supports that illogical and rigid approach.

Schumer's further attempt to deny the circuit split on this point is even more of a stretch. Schumer asserts that the Seventh Circuit "subsequently repudiated" one of the cases cited by Hughes, *Pritchard v. Rainfair, Inc.*, 945 F.2d 185, 191 (7th Cir. 1991). *See* Opp. at 10 n.7 (citing *Teumer v. General Motors Corp.*, 34 F.3d 542, [545] (7th Cir. 1994)). But *Teumer* merely held that a plaintiff is not invariably bound by the specific *legal* theories set forth in a complaint, but may subsequently invoke new and different legal theories to support the *facts* alleged therein. *See* 34 F.3d at 545 (limiting *Pritchard* only to the extent the latter might be read to "sugges[t]" that "a complaint that does not contain the appropriate *legal theory* to match the facts alleged is deficient") (emphasis added). *Teumer*, accordingly, provides

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[4] Indeed, it would be ludicrous to hold at the *certiorari* stage that a petitioner could, through the phrasing of the questions presented, "waive" an issue explicitly presented for review in the body of the petition. Even if the Court were to conclude that the "public fisc" issue as framed in Hughes' petition did not fairly embrace the *de facto* amendment issue, the remedy at this stage would not be to deem the latter issue waived, but to rewrite one or more of the questions presented. *See, e.g., Ankenbrandt v. Richards*, 502 U.S. 1023 (1992); *Hudson v. McMillian*, 500 U.S. 903 (1991).

no support for the Ninth Circuit's rule that a district court has *no discretion* to prevent a plaintiff from resisting summary judgment on the basis of entirely new *factual* allegations not pleaded in the complaint. Indeed, established law in the Seventh Circuit and elsewhere is clearly to the contrary. *See* Pet. at 19; *see also Samuels v. Wilder*, 871 F.2d 1346, 1350-51 (7th Cir. 1989); *NL Indus., Inc. v. GHR Energy Corp.*, 940 F.2d 957 (5th Cir. 1991), *cert. denied*, 502 U.S. 1032 (1992).

B. The "Public Fisc" Issue

On the merits of the "public fisc" issue, Schumer conspicuously attempts to distance himself from the decision below. The Ninth Circuit could scarcely have been clearer in holding that Schumer's allegation that Hughes violated the Government's Cost Accounting Standards ("CAS") "creates a genuine issue of material fact relating to a violation of the False Claims Act" *regardless* of any resulting injury to the public fisc. App. at 25a-26a. "[T]he lack of a determination of actual harm from the CAS violation does not preclude a claim under the FCA." *Id.* at 25a.

Schumer, however, dismisses that analysis—on which the Ninth Circuit expressly based its holding—as "dictum" that "in no way suggests that the court below intended (or could have intended) to dispense with the 'injury' requirement." Opp. at 12. If, as Schumer contends, the Ninth Circuit did indeed recognize an "injury" requirement under the FCA, it could scarcely have expressed itself more inartfully. In any event, Schumer insists that the element of injury is "plainly present here," Opp. at 11, in the form of the costs presumably incurred in the government investigation that ultimately concluded that Hughes' challenged accounting practices had actually *saved* the Government money. Notwithstanding the Government's conclusion, Schumer improbably contends that the investigation costs *alone* as a matter of law satisfy the statutory

requirement of injury to the public fisc that he (unlike the Ninth Circuit) recognizes.[5]

As a practical matter, Schumer's expansive theory of "injury" would eliminate the injury requirement altogether. Schumer's suggestion that this Court ratified his creative theory in *United States v. Halper*, 490 U.S. 435 (1989), is far-fetched at best. The question in *Halper* was whether a particular civil fine under the FCA should be deemed "punitive" so as to preclude any subsequent criminal prosecution. In rejecting that double-jeopardy claim, the *Halper* Court analogized an FCA fine to a liquidated damages provision that served in part to compensate the Government for its losses (including its investigative and prosecutorial costs) resulting from a party's fraud. *Id.* at 445-46 & n.6. The *Halper* Court in no way held that such attenuated "injuries" were enough, *in and of themselves*, to provide the basis for an FCA *qui tam* action.[6]

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[5] While reiterating in passing the Ninth Circuit's assertion that the alleged CAS violations "may" have resulted in "unallowable" costs, Opp. at 12, Schumer conspicuously fails to respond to Hughes' explanation that any such conclusion is foreclosed by the Government's determination that Hughes' accounting methods complied with applicable regulations. *See* Pet. at 20-21 n.7.

[6] Schumer also insinuates that this Court's review of the "public fisc" issue would be inappropriate because Hughes did not raise that issue below. *See* Opp. at 11 n.8. But Hughes had no reason to do so, because the issue did not arise until the Ninth Circuit's remarkable decision to affirm the award of summary judgment in Hughes' favor on all claims *except* those alleging wholly technical violations of government accounting procedures. Because the decision below expressly addressed the "public fisc" issue, that issue is unquestionably before this Court. *See, e.g., Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995).

III. THE CONSTITUTIONAL ISSUES

Finally, Schumer seeks to avoid review of the underlying constitutionality of the FCA's *qui tam* provisions on the ground that the constitutional issues are well-settled. Indeed, he chides Hughes for even daring to suggest to the contrary: "Hughes' assertion that the constitutional issues 'remain[] unsettled' is . . . made up out of whole cloth." Opp. at 14-15 (citation omitted). Schumer's aggressive contention that it is too late in the day even to question the constitutionality of private *qui tam* actions is perhaps the best evidence of the need to do just that.

Schumer bases his contention on four court-of-appeals decisions issued in the past four years and a snippet of *dicta* from an opinion rendered by this Court more than a half-century ago.[7] Needless to say, those authorities are hardly conclusive. The constitutional questions at stake are simply too important to be deemed "settled" by default. The Constitution gives the final word on such questions to *this* Court, and to this Court alone.

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[7] Schumer also emphasizes this Court's denial of *certiorari* in *Boeing Co. v. United States ex rel. Kelly*, 114 S. Ct. 1125 (1994), apparently hoping to suggest that the Court thereby implicitly ratified the constitutionality of the FCA's *qui tam* provisions. *See* Opp. at 14. Any such suggestion, of course, is wholly unwarranted. *See, e.g., Missouri v. Jenkins*, 115 S. Ct. 2038, 2047 (1995).

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This Supplemental Brief responds to the Brief for the United States as Amicus Curiae.

1. The "Public Disclosure" Issue

A. The United States asserts that this Court should not review the acknowledged circuit split created by the decision below because the Ninth Circuit could have decided this case (but did not) on narrow factual grounds "reconcilable" with the Second Circuit's holding in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992). *See* U.S. Br. at 11-13. That assertion is untenable as a matter of law and fact.

The Ninth Circuit held below that "disclosure to company employees does not constitute public disclosure." Pet. App. at 11a. The court did not remotely purport to limit that holding to the particular facts of this case—to the contrary, the court went out of its way to announce a *per se* legal rule that disclosure to "innocent employees" cannot qualify as "public disclosure" *as a matter of law*. *Id.* at 9a-11a. According to the Ninth Circuit, it is "unrealistic" to treat such employees as members of the general public. *Id.* at 9a. "Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure." *Id.*

The Ninth Circuit acknowledged that the Second Circuit in *Doe* had adopted precisely the opposite *per se* rule—that disclosure to a contractor's "innocent employees" *does* qualify as "public disclosure" as a matter of law. *See Doe*, 960 F.2d at 323-24. The Ninth Circuit expressly and emphatically rejected that holding. *See* Pet. App. at 11a ("[W]e reject the *Doe* court's definition of 'public disclosure,' which forecloses many insiders from bringing *qui tam* actions."); *id.* at 9a ("We decline to adopt the rule of *Doe* for application in this circuit.").

The United States now suggests that both the Second and Ninth Circuits erred in approaching the definition of "public

disclosure" as a *legal* question. According to the United States, "[t]he question whether information revealed to a corporate defendant's employees is the subject of a 'public disclosure' cannot appropriately be resolved on the basis of a per se rule." U.S. Br. at 11. Under this view, the application of the FCA's jurisdictional bar involves an essentially *factual* inquiry that "depends upon the circumstances under which the information is revealed," *id.*, and must be resolved on a case-by-case basis.

Applying its fact-based definition of "public disclosure"—which neither the Ninth nor the Second Circuit adopted—the United States concludes that this case and *Doe* are "reconcilable." U.S. Br. at 11. The asserted "public disclosure" here, the United States suggests, was not as "public" as the "public disclosure" in *Doe*. *Id.* at 12-13. Thus, the United States declares, both this case and *Doe* were correctly decided (albeit for the wrong reasons) and this Court should not review the conflicting *per se* rules of law announced by the Ninth and Second Circuits. *Id.* at 13.

The United States' position is preposterous. An acknowledged circuit split is no less real (and no less worthy of this Court's review) because one or both of the circuits might have rested its holding on different and narrower grounds. Regardless of whether the Ninth Circuit could reasonably have distinguished *Doe* on narrow factual grounds, the fact remains that the Ninth Circuit *did not do so*. The Ninth and Second Circuits have adopted contradictory *legal* definitions of "public disclosure." The United States may believe that both those definitions are wrong, but it cannot deny that the decision below is "in conflict with the decision of another United States court of appeals" on an important question of federal law. Sup. Ct. R. 10(a). Indeed, even respondent Schumer did not attempt to deny the circuit conflict. *See* Opp. Br. at 1, 8-9. The United States' efforts to advance yet *another* definition of "public disclosure" only highlight the need for this Court to review this important question.

In any event, there is no tenable basis for distinguishing *Doe* on factual grounds. It is true that *Doe* involved both a civil and a criminal investigation of a government contractor whereas this case involves only a civil audit and investigation. But the *Doe* Court expressly rested its "public disclosure" holding on the civil, *not* the criminal investigation. *See* 960 F.2d at 323.

Accordingly, it is disingenuous (to say the least) for the United States now to suggest that the "public disclosure" holding in *Doe* depended on the *criminal* investigation. *See* U.S. Br. at 10-11, 13. Because neither the court below nor the *Doe* court rested its definition of "public disclosure" on narrow factual grounds, there is simply no way to compare the relative dissemination of the information in the two cases. There is certainly no basis for the United States' extraordinary assertion that the government audits in this case received only "limited dissemination" among petitioner's employees, or that the "innocent employees" in *Doe* "acquired information from the government . . . not in the course or scope of their private employment, but essentially as members of the public who might have had knowledge of evidence relevant to the government's investigation." *Id.* at 13. The United States' attempt to rewrite the holdings in this case and *Doe* is based wholly on unvarnished speculation.[1]

Indeed, the United States' current assertion that the definition of "public disclosure" is not susceptible to a *per se*

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[1] If anything, the administrative investigation in this case appears to have been more broadly disclosed than the administrative investigation in *Doe*. Here, after all, the allegations of wrongdoing were presented not only to *petitioner*'s "innocent employees" but also to *Northrop*'s. Northrop employees were not only *aware* of the Government investigation of petitioner's accounting practices; they *launched* that investigation. *See* White Paper on "Radar Commonality" dated Feb. 20, 1986, attached to Declaration of Laurie L. Bilbruck, dated 10/12/90, filed as Attachment D to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed 10/15/90; Deposition of Robert C. Davis, at 43 (Ex. 86 to Defendant Hughes Aircraft Company's Exhibits in Support of Motion for Summary Judgment (filed 1/27/92)).

rule is a marked departure from the United States' longstanding position to the contrary. The United States has most often addressed this issue in the context of *qui tam* actions brought by government employees. In such cases, the United States has consistently argued that—*regardless of the facts*—the "public disclosure" provision *as a matter of law* prohibits both government employees and private parties from bringing "parasitic" *qui tam* actions based on information obtained from the Government. "A suit by a private person who relies upon information disclosed to him by a government employee in the course of an 'audit, or investigation,' [is] barred, *whether or not the information has been disclosed to the public at large*. The fact that the information derives from the government and has been disclosed pursuant to that 'audit, or investigation,' as those terms are broadly defined, is sufficient to bar a complaint based on that information." Brief for the United States at 14, *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1991) (No. 90-1246) (excerpted *infra*, Appendix A, at 9a) (emphasis added). *See also* Brief for the United States at 16, *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991) (No. 89-3973) (excerpted *infra*, Appendix B, at 24a) ("The 1986 version of the jurisdictional bar . . . continues the existing bar on parasitical suits.").

In particular, the United States now endorses the very argument that it has long opposed: that no "public disclosure" can occur where "innocent employees" (either of the government or a contractor) receive confidential information in the course of their employment. *See* U.S. Br. at 12. This issue arises frequently in *qui tam* suits filed by government employees. In opposing such suits, the United States has invariably argued that the confidential information obtained from the government is "publicly disclosed" as a matter of law. "The legislative history as well as the language of section 3730(d)(1) demonstrate . . . that Congress referred to 'public' disclosures in its broadest sense and was concerned principally with the use of government information." Brief for the United States at 21, *United States ex rel. Williams*, *infra* at 28a

(footnotes omitted). Indeed, the United States has previously characterized the argument that no "public disclosure" can result from the dissemination of confidential materials as "irrational" and without "foundation in the statute, its history, or the extensive 1986 legislative materials." *See id.* at 8, 18, *infra* at 18a, 25a.

The United States' attempt to justify the Ninth Circuit's outlandish decision under a fact-based rationale that the Ninth Circuit did not adopt is not only wrongheaded but also unworkable. The United States' fact-based approach to "public disclosure" would require the district court in every case to conduct factual hearings on the threshold question of jurisdiction. The district court's unenviable task in such a hearing would be to resolve the intractable question of just how "public" a particular "disclosure" had been. Disputed issues of material fact about the nature and extent of a particular disclosure would presumably be submitted to a jury. It is unlikely, to say the least, that Congress intended the FCA's jurisdictional bar to operate in this cumbersome manner. A jurisdictional bar is hardly effective if it entails extensive collateral litigation. Thus, it is not surprising that the courts of appeals have rejected the fact-based approach now advanced by the Government in favor of *per se* rules of law.

In the final analysis, the effect of denying the petition (as the United States recommends) would be to leave in place not only an acknowledged circuit split but also the Ninth Circuit's *per se* rule that the United States conspicuously declines to defend. As none other than the United States has recently stressed, the Ninth Circuit is home to a disproportionate number of *qui tam* cases. *See* Petition for Certiorari at 21, *United States v. Northrop Corp.*, No. 96-123 (filed July 22, 1996). The decision below is binding precedent: the employees of government contractors are now free in the Ninth Circuit to file "parasitic" *qui tam* actions based wholly on information obtained from the Government. The FCA neither requires nor tolerates that absurd result.

B. The United States next contends that petitioner's alternative argument—that a "public disclosure" occurs when government documents are made available under FOIA—is unworthy of review because the United States does not agree with it. *See* U.S. Br. at 14. The fact remains, however, that the circuits are in disarray on the question whether a "public disclosure" occurs at the point when government information is made *available* to the public, or at the point when a member of the public *actually obtains* that information. *See* Pet. at 16-18. Indeed, the Tenth Circuit recently highlighted this disarray:

> Our sister circuits are divided on the question whether theoretical or potential accessibility—as opposed to actual disclosure—of allegations or transactions is sufficient to bar a *qui tam* suit that is based upon such information. *Compare United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1158 (3d Cir. 1991) (information exchanged between private parties through discovery but not filed with the court is 'potentially accessible to the public' and thus is publicly disclosed) *with United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519-20 (9th Cir. 1995) (holding that 'public disclosure' means actual disclosure rather than potential availability), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 15, 1996) (No. 95-1340) *and United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 652-53 (D.C. Cir. 1994) (expressing doubt that documents revealed during discovery but not filed in court were publicly disclosed, and rejecting view that 'public disclosure' includes information that 'is only theoretically available upon the public's request.').

United States ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1519 (10th Cir. 1996). This Court can and should resolve this additional circuit conflict in the course of addressing the meaning of "public disclosure" in this case.

2. The Retroactivity Issue

The United States also urges this Court to deny review on the retroactivity issue. The United States concedes that the retroactivity holding below conflicts with the Sixth Circuit's decision in *United States ex rel. Eagleye v. TRW, Inc.*, 4 F.3d 417, 422-23 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1370 (1994), but insists that *TRW* is no longer good law in light of this Court's subsequent decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). As petitioner has noted, however, *TRW* is entirely consistent with *Landgraf*—a point underscored by this Court's denial of certiorari in *TRW* shortly before *Landgraf* was announced. *See* Pet. at 10 n.2, Pet. Reply at 2. It would make little sense for this Court to review the statutory issues described above without considering whether the 1986 FCA amendments apply here in the first place. Thus, the retroactivity issue merits review both in its own right and in connection with the other questions presented in this case.[2]

3. The "Public Fisc" Issue

Perhaps the most astonishing aspect of this case is that it does not involve any false "claim" against the United States at all. Respondent challenged certain of petitioner's accounting practices; the Government has conclusively determined that those practices actually *saved* it money. Thus, the basic predicate for an FCA action is missing.

The United States, however, endorses the Ninth Circuit's conclusion that no injury to the public fisc is necessary to establish an FCA cause of action. *See* U.S. Br. at 14-16. That interpretation vastly expands the scope of the FCA from false *claims* against the Government to false *statements* to the Government. The latter, of course, are already proscribed by 18 U.S.C. § 1001. As a matter of language and logic, it is

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[2] The retroactivity issue is also presented in another pending petition, *Northrop Grumman Corp. v. United States ex rel. Hyatt*, No. 96-17 (filed July 2, 1996).

simply impossible to characterize the alleged use of an improper accounting method, without more, as a "claim," much less a "false claim" actionable under the FCA.

The United States also errs by asserting that the lower courts are in harmony on this point. To the contrary, a recent decision only underscores the prevailing disarray. *See United States ex rel. Pogue v. American Healthcorp, Inc.*, 914 F. Supp. 1507 (M.D. Tenn. 1996). The district court there originally granted summary judgment in favor of an FCA defendant on the ground that the plaintiff had failed to allege any injury to the public fisc. *See* 1995 WL 626514 at *6 (relying on *Young-Montenay, Inc. v. United States*, 15 F.3d 1040, 1043 (Fed. Cir. 1994)). The plaintiff then moved for reconsideration, relying on several cases (including the decision below) holding that injury to the public fisc is not an essential element of an FCA cause of action. The district court noted the clear split in authority on this question, *see* 914 F. Supp. at 1508-09, but deemed its original holding inconsistent with this Court's decision in *Rex Trailer Co. v. United States*, 350 U.S. 148, 152 (1956). *See* 914 F. Supp. at 1509 ("While there is clearly some disagreement among the courts regarding this issue, this Court cannot ignore the decision of the Supreme Court in *Rex Trailer*.").

As petitioner has noted, however, *Rex Trailer* stands only for the unremarkable proposition that an FCA plaintiff need not produce specific evidence of *damages*, not for the startling proposition that the plaintiff need not establish *any injury at all*. *See* Pet. at 21-22. Accordingly, the "public fisc" issue merits review both in its own right and in connection with the other questions here presented.

D. The Constitutional Issues

Finally, the United States asserts that this Court should decline to review the underlying constitutional questions raised in this case. According to the United States, such review is unwarranted because (1) no circuit split exists on the constitutionality of the FCA's *qui tam* provisions, *see* U.S. Br.

at 16, and (2) the decision below is correct on the merits, *see id.* at 17-20. Both points are meritless.

As an initial matter, the Government is in no position to argue that this Court should review only those issues on which there is a circuit split, because the Government itself has asked this Court to review a Ninth Circuit interpretation of the FCA on which there is concededly no split. *See* Petition for Certiorari at 21-22, *United States v. Northrop Corp.*, No. 96-123 (filed July 22, 1996). Surely, if a particular application of the FCA's *qui tam* provisions warrants this Court's review in the absence of a split, the underlying constitutionality of those provisions is a matter at least as worthy of review.[3]

In any event, the constitutional issues here merit review not only in their own right, but also in connection with the statutory issues presented, on which the circuits manifestly *are* in conflict. These statutory issues cannot and should not be decided in a constitutional vacuum.

On the merits, the United States remarkably fails to address petitioner's principal constitutional argument: that Congress cannot delegate to private parties the core Executive power of executing the laws of the United States on behalf and in the name of the United States. *See* Pet. at 23-24. Rather, the United States breezily asserts that the FCA's *qui tam* provisions raise no separation-of-powers problems. *See* U.S. Br. at 20. Although it is not unprecedented for the Executive Branch to argue against Executive Power, *see Metropolitan Washington Airports Auth. v. Citizens for the Abatement of*

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[3] The United States' petition in *Northrop* conspicuously fails to raise any constitutional concerns with respect to the FCA's *qui tam* provisions, even though the Ninth Circuit there held that the Attorney General lacks the power under the FCA to block the voluntary dismissal of a *qui tam* action. *See* Petition for Certiorari at 2a-5a, *United States v. Northrop Corp.*, No. 96-123 (filed July 22, 1996). That holding, of course, cannot be squared with the fiction that the Attorney General maintains any meaningful "control" over *qui tam* relators, and thus underscores the constitutional infirmity of the FCA's *qui tam* provisions.

Aircraft Noise, Inc., 501 U.S. 252, 263-64 (1991), it is up to *this Court* to determine the relative powers of the Branches, *see id.* at 272.

The United States next asserts that the FCA's *qui tam* provisions survive scrutiny under the Appointments Clause on the theory that a *qui tam* relator is "analog[ous] to a plaintiff who invokes a private right of action under a federal statute." U.S. Br. at 19. Although in both situations it can be said that the "private lawsuit assists in the effectuation of federal policy," *id.* at 20, the distinction is obvious: run-of-the-mill private plaintiffs assert rights of action under federal statutes *in their own name* for an injury that *they* have allegedly suffered, whereas *qui tam* relators assert a right of action *in the name of the United States* for an injury that the *United States* has allegedly suffered. The latter function is the core Executive Power to execute the laws of the United States on behalf and in the name of the United States, and hence cannot be exercised by persons who have not been duly appointed pursuant to the Constitution.

Finally, the United States asserts that the FCA's *qui tam* provisions are consistent with the standing requirements of Article III. *See* U.S. Br. at 17-18 & n.11. The United States, however, makes no more than a token effort to reconcile its arguments with modern standing law. It is well established that Congress is constrained by the constitutional "case or controversy" requirement, and cannot confer standing at will. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-78 (1992). This constitutional limitation would be meaningless if Congress were free to create private standing where it would not otherwise exist by simply purporting to "assign" rights belonging to the United States or third parties, or by creating a statutory bounty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

No. 90-1246

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA *ex rel.* ROLAND A. LEBLANC,

Plaintiff-Appellant,

v.

RAYTHEON COMPANY, INC.,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES OF AMERICA

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* * *

SUMMARY OF ARGUMENT

The district court correctly ruled that Mr. LeBlanc's suit, which is based entirely upon information obtained in the course of his government employment, is barred under the plain language of the 1986 amendments to the False Claims Act, and that to allow such a suit would directly contravene Congress' expressed intent to assist the Attorney General of his antifraud efforts.

In his fight against fraud, the Attorney General must rely on large numbers of investigators, auditors, attorneys, and other government personnel. If these employees could file qui tam complaints for their own private profit based upon information that comes in to the government, they could well spend their time gathering information to be used for their own complaints. The skewed incentives created by such a rule would wreak havoc on the government's antifraud program as well as on personnel management within the government and would undermine the Attorney General's enforcement priorities. Such suits would not supplement government enforcement—which was Congress' express purpose in liberalizing the qui tam provisions of the False Claims Act in 1986[2]—but would instead supplant it. The district court decision rejecting such an interpretation of the Act should be affirmed.

ARGUMENT

The False Claims Act, 31 U.S.C. § 3730(e)(4), divests the district courts of subject matter jurisdiction over qui tam suits based solely upon information obtained by the federal government. There is no dispute that Mr. LeBlanc's complaint was based upon such information; the complaint was therefore properly dismissed.

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[2] *See* S. Rep. No. 345, 99th Cong., 2d Sess. at 7-8, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5272-73 (purpose of qui tam statute is to supplement overstretched government enforcement resources).

I. THE BAR ON FALSE CLAIMS ACT SUITS BY GOVERNMENT EMPLOYEES BASED UPON GOVERNMENT INFORMATION IN EFFECT SINCE 1943 HAS NEVER BEEN REPEALED

To our knowledge, no government employee has ever successfully prosecuted a case under the False Claims Act. The Act was enacted in 1863, and from that date until 1943, when the statute was amended, we are aware of no cases where courts permitted such actions to go forward.[3] In 1943, despite strong policy concerns to the contrary, the Supreme Court said in dicta that such cases were permissible under the then-existing version of the Act. Congress' reaction was swift and complete: it immediately passed amendments to the False Claims Act overruling that dicta and prohibiting parasitical False Claims Act suits by private persons based on information in the possession of the government, which includes all lawsuits based upon information obtained from the government in the course of government employment.

Congress again amended the statute in 1986, intending to change the language of the statute to overrule broad court decisions interpreting the 1943 restrictions. Case law had outlawed not only lawsuits based on information obtained by the government, but also lawsuits brought by private parties based on information about fraud that they had independently obtained, which also happened to be in the possession of the government, even if the qui tam plaintiff had given the information to the government in the first place. The 1986 amendments were designed to overrule this restrictive case law.

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[3] The argument by both plaintiff-appellant LeBlanc and by amicus curiae National Treasury Employees Union that this Court should permit government employee suits because "[s]uch suits had been allowed until enactment of the 1943 prohibition," NTEU Brief at 7, *id.* at 9, App. Brief at 10, is distinguished by a notable absence of supporting authority. Since there is no evidence of such suits at any time, the statement by amicus that Congress intended to "reinstate" such suits in 1986, NTEU Brief at 7, is equally curious.

Nothing in either the 1986 statute or its voluminous legislative history even hints that Congress intended to modify in any way, let alone eliminate, the 1943 bar upon government employee suits. The district court opinion rejecting an interpretation of the statute that would have permitted such suits is therefore correct.[4]

A. In 1943, Congress Fixed The False Claims Act To Prohibit "Parasitical" Qui Tam Suits By Government Employees, And It Has Never Repealed That Ban

In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), the Supreme Court held that "parasitical" qui tam suits brought by private parties under the False Claims Act based on information copied from the government could go forward. The Court in dicta also stated that "even a district attorney, who would presumably gain all knowledge of a fraud from his official position, might sue as the informer [qui tam relator]" in a qui tam suit. 317 U.S. at 546.

In dissent, Justice Jackson said that to interpret the statute to mean that "law-enforcement officials could use information gleaned in their investigations to sue as informers for their own profit, would make the law a downright vicious and corrupting one." Justice Jackson went on to say, presciently, that "[i]f we were to add motives of personal

[4] Two other district courts have come to the same conclusion as the court in this case, dismissing for lack of subject matter jurisdiction suits based upon information obtained in the course of government employment. *United States ex rel. Arthur P. Williams v. NEC Corp.*, No. 89-209-Civ-Orl-18 (M.D. Fla. May 12, 1989), *appeal pending*, No. 90-3188 (11th Cir.) (suit brought by former Department of Defense attorney based on information that the attorney had obtained while performing his official duties for the Department of the Air Force was dismissed); *United States v. Stern*, No. 90-153-CIV-T-17 (M.D. Fla. April 25, 1990) (court refused to allow former employee of the Department of Health and Human Services Inspector General to continue as a qui tam plaintiff in a suit that was taken over and refiled by the Attorney General).

avarice to other prompters of official zeal the time might come when the scandals of law-enforcement would exceed the scandals of its violation." 317 U.S. at 560.

With Justice Jackson's reasoning in mind, soon after *Hess* the Department of Justice recommended remedial legislation to bar these types of "parasitical" suits based upon government information, because they would impede the Department's efforts against fraud. *See* H.R. Rep. No. 263, 78th Cong. 1st Sess. 2 (1943).[5] Many Congressmen also severely criticized the "parasitical" suits permitted by *Hess*. Representative Hancock stated, for example:

> The temptation and the opportunity is tremendous under the present law for renegotiators, contracting officers of the various purchasing agencies of the government, and agents for collectors of internal revenue to take advantage of the information they discover in the course of the business to enrich themselves by instigating informer's suits. That is a temptation we wish to remove.

89 Cong. Rec. 10849 (December 17, 1943).

That same year, Congress amended the False Claims Act to overrule *Hess* and to outlaw suits based on information

[5] The Department's proposal to eliminate parasitical qui tam actions in no way demonstrates, as Mr. LeBlanc contends (App. Brief at 3 n.1), any general "antipathy to qui tam actions" on the part of the Department of Justice. Nor does the fact that, not surprisingly, private plaintiffs often complain that the Department's settlement proposals are "inadequate," in any way demonstrate a "hostility" on the part of the Department to qui tam actions, *see* App. Brief at 4 n. 1. The Department's view of qui tam suits is in any event irrelevant; the question before the Court is the proper interpretation of the statute, not the Department's attitude towards the statute.

obtained from the government,[6] barring any private suit "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."[7] This bar took away subject matter jurisdiction from the courts to hear lawsuits based upon information in the possession of the government at the time the lawsuit was brought, including lawsuits brought by government employees based upon information obtained in the course of their government work—such information by definition being "in the possession of the United States, or any * * * employee thereof." As one of the floor managers of the bill explained, the amendment precluded government employees from appropriating government information for their own or their friends' use; under the amendment these individuals were not permitted to use the qui tam provisions of the False Claims Act to sue in their private capacity and reap the qui tam reward. 89 Cong. Rec. 10846 (December 17, 1943) (Statement of Representative Walter). False Claims Act suits based upon information gained in the course of government employment were thereafter barred. *See United States ex. rel. McCans v. Armour & Co.*, 146 F. Supp. 546 (D.D.C. 1956), *aff'd*, 254 F.2d 90 (D.C. Cir.), *cert. denied*, 358 U.S. 834 (1958).

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[6] *See United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984) ("Congress's immediate concern in enacting the 1943 Amendments was to do away with the 'parasitical suits' allowed by *Hess*"); *Pettis ex rel. United States v. Morrison-Knudsen Co., Inc.*, 577 F.2d 668, 671 (9th Cir. 1978) ("The immediate concern of Congress was to do away with these so-called 'parasitical suits.'").

[7] This provision was originally codified at 31 U.S.C. § 232(C) (1976), and recodified at 31 U.S.C. § 3730(b)(4) (1982).

B. The Plain Language Of The 1986 Amendments Continues To Prohibit Suits Based Upon Information Obtained In The Course Of Government Employment

Congress has never repealed the bar upon False Claims Act suits by government employees. In 1986 Congress amended the Act, but neither the amendments themselves nor their legislative history contain anything to support the notion that Congress had decided to allow government employee suits or that it had even considered this issue. Not surprisingly, Mr. LeBlanc himself has conceded that nothing in the legislative history to the 1986 amendments "address[es] the question of whether Government employees may bring qui tam actions." App. Brief at 14; *id.* at 12. Surely, one would expect that such a major change in the statute, if intended, would be discussed somewhere in the voluminous legislative history; but that history is entirely silent. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 285 n. 13 (1974) ("If Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly.")

An examination of the plain language of the 1986 amendments, far from supporting reversal of the district court decision as Mr. LeBlanc argues, demonstrates on the contrary that the district court's conclusion was correct. The amendments continue the former ban on parasitic lawsuits by outlawing False Claims Act suits based upon "public disclosures" of government information. Mr. LeBlanc's lawsuit in this case is based upon such a disclosure.

The amendments provide as follows:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless

> the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4). Under this section, a person is generally barred from filing a qui tam suit that is "based upon the public disclosure of allegations or transactions." Nothing in the new language or the legislative history of the 1986 amendments suggests that Congress intended to remove the existing bar on government employees exploiting official information to file qui tam suits for their own profit; nor is there any reason that Congress would have done so.

Contrary to Mr. LeBlanc's argument, the types of "public disclosures" upon which a lawsuit may not be based should not be construed narrowly. As to disclosures made in litigation, for example, the statute says only that disclosures in a "hearing" cannot provide the basis for a False Claims Act suit; yet the courts have correctly interpreted the word "hearing" broadly to include any part of the litigation process in which disclosures are made, whether or not a hearing is involved. *See Houck, on behalf of United States v. Folding Carton Administration Committee*, 881 F.2d 494, 504 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1471, 1514 (1990) ("hearing" includes disclosures made in motions filed with the court); *United States ex rel. Stinson, Lyons Gerlin & Bustamante v. Prudential Ins. Co. of Am.*, __ F. Supp. ___, 1990 Westlaw 57309, slip op. at 20 (D.N.J. May 4, 1990) ("hearing" includes information contained in discovery materials).

The other types of disclosures of government information listed in the statute, such as audits and investigations, should also be interpreted broadly. The word "investigation" is not a term of art; all investigations have a starting point, which can be deemed as the date upon which information indicating a potential False Claims Act violation falls into the hands of a government employee. Mr. LeBlanc was a Quality Assurance Specialist for the Department of Defense assigned to monitor the work of the contractor he

named as a defendant; *all* of his work as an employee of the government was in some sense part of an investigation or audit within the meaning of section 3730(e)(4).

Moreover, while Mr. LeBlanc argues that the disclosures addressed in the statute are only disclosures made to the public at large, nothing in the statute so restricts the term "public disclosure." Consistently with the purpose of prohibiting parasitic lawsuits, a "public disclosure" occurs where there has been any type of disclosure of official government information to a private individual. 31 U.S.C. § 3730(e)(4)(A). Complaints based upon such disclosures are equally impermissible even if the disclosure is limited to a few individuals. For example, in *Stinson, supra*, slip op. at 20, the court concluded that the only interpretation of "public disclosure" that is consistent with congressional intent is one under which complaints based upon information contained in discovery materials produced in a legal proceeding are barred; whether that material had actually been made available to the public at large was held to be immaterial.

A suit by a private person who relies upon information disclosed to him by a government employee in the course of an "audit, or investigation," would also be barred, whether or not the information has been disclosed to the public at large. The fact that the information derives from the government and has been disclosed pursuant to that "audit, or investigation," as those terms are broadly defined, is sufficient to bar a complaint based on that information. If a private person cannot use information that he obtained from a government employee for a qui tam suit because the information was "disclosed" from the government within the meaning of section 3730(e)(4), the government employee also cannot take that information to file his own personal qui tam suit for his private gain; such a use

also involves a "disclosure." A contrary conclusion would be illogical and contrary to Congress' intent.[8]

While no "public disclosure" occurs when a government employee transmits information to another government employee as a part of their mutual official duties, every government employee has a dual status. When acting in an official capacity the employee is an arm of the government. *See* 28 U.S.C. § 2679(d)(1) (United States is solely responsible for the civil consequences of all acts of employee acting within scope of their federal government employment); 44 Comp. Gen. 312 (1964) (United States government is responsible to pay civil fine imposed upon federal employees for acts he took in the performance of his official duties). As such, the employee's efforts, as well as the information and knowledge he gains by reason of his employment, are the government's property. *See Snepp v. United States*, 444 U.S. 507 (1980) (per curiam); H. Con. Res. 175, 72A Stat. B12, 85th Cong., 2d Sess. (1958) (information obtained in the performance of government duties may not be used for making private profit); Executive Order No. 11222, § 203, § 205 (1965) (federal employees may not use information obtained through their employment or use official information for the purpose of private profit or furthering a private interest); Executive Order No. 12674, § 101(c) (1989) (same); 5 C.F.R. §§ 735.204(a)(2), -.206 (same); 32 C.F.R. § 40.4(b)(2) (Department of Defense personnel may not use government information for personal advantage either during or after government service); 32 C.F.R. § 40.4(c)(7)(1) (government property shall be used only for

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[8] Thus, if government employees could file qui tam suits based upon official information, they would be granted a special status, since they would be the *only* persons who could take government information and appropriate it for their own use to file such suits. There is no evidence either in the statute or the legislative history that Congress intended such a distinction, and in fact, if such a distinction were to have been made, one would expect it to be exactly the opposite: that parasitical suits could be filed by private persons but not by government employees.

official government purposes); *see also* Exec. Order 10096, § 1(a) (1950) (inventions created on government time or using government facilities, equipment, materials, funds, or information, or made in consequence of the inventor's official government duties are the property of the government); 17 U.S.C. § 105 (government employee writings created on official time are not copyrightable by the employee).

So long as the employee uses official information only in his official capacity for the purpose of furthering the government's business, no disclosure occurs because the information had never left the government. When he leaves work each day, however, the employee reverts to his status as a private member of the public. Outside of his official capacity, as the district court held (A.11), his acts are his alone and are not attributable to the government. This distinction between an individual in his government-employee capacity and in his private capacity is hardly novel; courts routinely make this distinction under, for example, the Federal Tort Claims Act, 28 U.S.C. § 2671 (definition of "employee of the government"), *see Hartzell v. United States*, 786 F.2d 964 (9th Cir. 1986), and under the Federal Employees Compensation Act, 5 U.S.C. § 8102 (compensation for injuries "sustained while in the performance of his duty"), *see Wallace v. United States*, 669 F.2d 947, 952-54 (4th Cir. 1982).

When the government employee uses government information to file his own personal qui tam suit, he acts not within his official capacity, but as a private person with respect to that information. Under these circumstances, the information has been "disclosed" to a member of the "public" because the government employee *qua* relator is acting in his private capacity; as the district court correctly held, he has in essence appropriated government information or property for his own use, A.11, no less than if he took a government vehicle home and used it for purely personal enjoyment.

The plain language of the statute thus supports the district court's decision. Even if, contrary to fact, the statute

were ambiguous, the legislative history contains no evidence that Congress intended to permit suits based upon information obtained in the course of government employment. The legislative history shows, on the contrary, Congress' distaste for parasitical suits, of which government employee suits are the epitome, since Congress expressly rejected a proposal that would have removed the permanent bar on parasitical suits. On two separate occasions, the Senate rejected a proposed "six month" rule that would have allowed qui tam suits based upon disclosure of government information to be filed if six months had passed from the time of the disclosure and the government had not filed suit in that time. Instead, it retained the permanent bar.[9] *See Houck*, 881 F.2d at 504. Thus, contrary to the suggestion of amicus curiae National Treasury Employees Union, the legislative history to the 1986 amendments not only does not support parasitical suits, it actively rejects them.

NTEU points to one paragraph of the voluminous legislative history in support of its claim that this history "fully supports" the conclusion that Congress "contemplated government-employee suits under the Act." NTEU Brief at 14. The cited legislative history, however, consists of a "background statement" reprinted in the Senate Report setting forth the need for additional fraud enforcement tools. S. Rep. No. 345,

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[9] *See* S. 1562 (original proposed 31 U.S.C. § 3730(e)(4), *reprinted in* S. Rep. No. 345, *supra*, at 43; *see id.* at 30, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5295); Amendment No. 2701 (proposed 31 U.S.C. § 3730(e)(5)), *reprinted in* 132 Cong. Rec. S11238, 11240 (daily ed. August 11, 1986); statement of Senator Grassley, *id.* at S11244 (Senate substitution of language permanently barring persons from bringing a qui tam action based solely on public information); H.R. 4827 (proposed 31 U.S.C. § 3730(b)(5)), *reprinted in* H.R. Rep. No. 660, 99th Cong., 2d Sess. 2-3 (1986), and 132 Cong. Rec. H6474-75 (daily ed. September 9, 1986) (House substitute jurisdictional bar containing six month bar); Amendment No. 3214 (proposed 31 U.S.C. § 3730(e)(4)); *reprinted in* 132 Cong. Rec. S15059, 15060 (daily ed. October 3, 1986) (Senate restoration of permanent bar on "public disclosure" suits, rejecting the "six month" rule a second time).

supra, at 4, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5269-70. In detailing the evidence that fraud against the government has become rampant, the Report includes a summary of a survey of federal government employees conducted by the Merit Systems Protection Board in which large numbers of federal employees stated that they knew of fraud or abuse but did not report it because, *inter alia*, they did not believe that the fraud would be investigated or prosecuted. *Id.* at 5, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5270. The Report states that Congress has agreed that the government's fraud investigation and prosecution tools are inadequate, and goes on to explain that the 1986 amendments will give the government additional tools to make fraud investigations more effective, including new authority to issue civil investigative demands and the repeal of restrictive court decisions. *Id.* at 6-7, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5271-72.

Contrary to NTEU's argument, nowhere in the Senate Report is there any statement or even any implication that Congress had made a determination that the appropriate remedy for the nonreporting of fraud by government employees, as set forth in the report of the Merit Systems Protection Board, should be a repeal of the 1943 bar on federal government employee suits. The Senate Report instead states that the purpose of the 1986 amendments to the qui tam provisions is to encourage additional "assistance from the *private citizenry*" to the government in prosecuting False Claims Act suits, and is designed to provide a more "effective vehicle for *private individuals* to disclose fraud." *Id.* at 8, 14, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5273, 5279 (emphasis added). Like the Senate Report, the parallel House Report states that the sole purpose of the 1986 amendments is to create additional incentives to "encourage *private individuals* who are aware of fraud" to file suit. H.R. Rep. No. 660, 99th Cong., 2d Sess. 23 (1986) (emphasis added). The House Report expressly reaffirms the "validity of the reasons for enactment of the 1943 amendments," *id.* at 22, and neither the House nor

Senate Report states or even implies that Congress had determined that federal government employees should be permitted to file False Claims Act suits.

The basic reason that Congress changed the qui tam statutory language in 1986 was to repeal overly "restrictive court interpretations" of the qui tam statute,[10] which had prohibited not only suits by private citizens based on information obtained by the government, but also suits brought by those who had independent information about fraud that the government also happened to possess,[11] including those who had independently obtained the information and given it to the government in the first place and then found themselves barred by that very submission.[12] Congress believed that legislative repeal of these adverse decisions would bolster the Attorney General's fraud enforcement efforts, and it made the statutory changes for this reason. The legislative history thus makes clear that the purpose of the qui tam amendments was to allow "assistance from the private citizenry [that] can make a significant impact on bolstering the Government's fraud enforcement effort." *See* S. Rep. 345, *supra* at 8, *reprinted in* 1986 U.S. Code Cong. & Ad. News at 5273.

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[10] *See* S. Rep. No. 345, *supra* at 4, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5269.

[11] *See* S. Rep. No. 345, *supra* at 29, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5294; *United States ex rel. Vance v. Westinghouse Elec. Corp.*, 363 F. Supp. 1038, 1042 (W.D. Pa. 1973).

[12] *See, e.g., Pettis ex rel. United States v. Morrison-Knudsen Co. Inc.*, 577 F.2d 668 (9th Cir. 1978). The bar on "original source" suits had created an especially perverse incentive: it was to the advantage of persons who had information about fraud to keep it to themselves, because providing it to the government would bar them from subsequently filing a qui tam suit. *See Safir v. Blackwell*, 579 F.2d 742, 746 (2d Cir. 1978), *cert. denied*, 441 U.S. 943 (1979). This squirreling away of information adversely affected orderly law enforcement by denying the government information that its citizens would normally have freely provided.

Mr. LeBlanc suggests that the Court should ignore this history and should find on the contrary that Congress' only goal was to expand the class of qui tam relators, whatever the effect of the resulting lawsuits upon fraud enforcement. Since his interpretation of the statute to permit government employees to sue would expand the class of private relators, he argues that it should be deemed to further congressional intent. Mr. LeBlanc ignores the purpose of the qui tam expansion, and ignores the fact that suits based solely on information obtained from the government would undermine law enforcement efforts in direct contravention of Congress' expressed intent.

* * *

CONCLUSION

For his complaint, Mr. LeBlanc has relied solely on information he obtained during his employment as a federal employee. The district court therefore correctly dismissed the action for lack of jurisdiction, because it is based upon a "public disclosure" of government information for which Mr. LeBlanc was not the "original source." 31 U.S.C. § 3730(e)(4). The decision should be affirmed.

Respectfully submitted,

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* * *

APPENDIX B

No. 89-3973

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.* ARTHUR P. WILLIAMS,
Plaintiff,

ARTHUR P. WILLIAMS,
Plaintiff-Appellant,

v.

NEC CORPORATION, *et al.*,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

STUART M. GERSON
Assistant Attorney General
ROBERT W. GENZMAN
United States Attorney
MICHAEL F. HERTZ
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* * *

SUMMARY OF ARGUMENT

The purpose of the informer's provision of the False Claims Act has always been to "protect the Treasury" by creating a monetary incentive for private citizens with independent knowledge of fraud against the government to come forward with the information. The diversion of a part of the government's recovery to the informer is deemed acceptable in such circumstances because without the monetary incentive, the information would never have come to light and the government would not have recovered at all. In 1943, Congress specifically addressed and barred this type of diversion to individuals who bring no new information to the lawsuit but who simply plagiarize information already in the possession of the government.

In amendments to the False Claims Act proposed in 1986, the original draft bill would have allowed these types of parasitical suits where six months had elapsed from the date that information had been publicly disclosed from within the government to the public at large, and the government had not yet acted on the information even if the relator brought no new information to the lawsuit. The Congress as a whole rejected this proposal, however, and it was not enacted. The jurisdictional bar contained in the 1986 amendments, however, continues to refer to actions based upon "public disclosures" of information from within the government, and bars any informer's suit that is based on such a disclosure.

The only substantive change intended by Congress in the amendments was to make it easier for genuine informers bringing new information to the government to file suit. This change was effected by rejecting case law that had prohibited informer's suits where information was in the possession of the government only because the informer had developed the information outside of the government and had provided it to the United States prior to filing suit. Under the amendments, a lawsuit brought by a government employee based upon information that he learned or developed within the scope of

his government employment continues to be barred, as the only Circuit Court to consider this issue has held. *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990).

Appellant argues that by using the "public disclosure" language, Congress prohibited only informer's suits based on information that has been disclosed from within the government to the public at large. By implication, appellant argues, Congress actively intended to permit such suits as long as the information is still confidential and has only been disclosed officially to government employees in the scope of their employment, or has been disclosed by a government employee to his friends or cohorts. This result is irrational and has no foundation in the statute, its history, or the extensive 1986 legislative materials.

Allowing government employees to bring lawsuits based on still confidential government investigations would lead to races to the courthouse by government employees who have access to government investigative materials and would subvert the Attorney General's anti-fraud program. An informer's suit on the facts of this case would undermine the purpose of the False Claims Act by diverting a percentage of the government's recovery to an informer where the government was pursuing its own investigation of the information at the time Mr. Williams' suit was filed and, absent his suit, would have obtained any recovery entirely on its own initiative.

By using the "public disclosure" language, Congress intended to bar all uses of government information to file informer's suits. It did so by describing the normal routes of information flow from within the government to the public at large, and barring informer's suits based on that information. Congress did not specifically address use of still confidential government information because it never occurred to anyone that a government employee or his confidante could make use of such information to file an informer's suit. In any event, by appropriating "official use only" information to file his private

suit, Mr. Williams is making use of government information that he has appropriated for his private use as a member of the public; this use qualifies as a "public disclosure" within the meaning of the statute.

ARGUMENT

I. THIS ACTION IS BARRED UNDER 31 U.S.C. § 3730(e)(4)(A)

A. In 1943 Congress Specifically Addressed And Barred Informer's Suits Based On Government Information

The False Claims Act was enacted in 1863,[6] substantially amended in 1943, and then amended again in 1986. The purpose of the statute has always been to "protect the Treasury" by giving the federal government tools to redress fraud, and by encouraging private individuals with independent knowledge of fraud to come forward and enjoy an informer's reward of a percentage of the government's recovery, and the statute should be interpreted in light of this goal. *United States v. Griswold*, 24 F. 361, 366 (D. Ore. 1885).

In 1943, the Supreme Court concluded that the language of the 1863 statute did not specifically prohibit plaintiffs who had no independent information of a fraud against the government from filing informer's suits, and that plaintiffs could simply copy government indictments into a

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[6] Act of March 2, 1863, ch. 67, 12 Stat. 696, *codified at* Rev. Stat. §§ 3490-3494, 5438 (1874). The statute created civil and criminal remedies against war contractors who had defrauded the government during the Civil War by, for example, furnishing shells filled with sawdust rather than explosive powder. 62 Cong. Globe 955, 37th Cong., 3d Sess. (1863) (Statement of Senator Howard). The civil remedy included double the damages sustained by the government by reason of a false claim together with a $2,000 forfeiture. Section 4 of the statute created an informer's provision, which allowed "any person" to bring a False Claims Act suit, and, under section 6, if such person prosecuted the case to final judgment he would be entitled to one-half the damages and forfeitures recovered.

civil complaint and recover an informer's award. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546 (1943).[7] In dissent, Justice Jackson condemned both the Court's literalism and dicta in the majority opinion that under the 1863 statute government attorneys could sue as informers, stating that to permit law-enforcement officials to "use information gleaned in their investigations to sue as informers for their own profit, would make the law a downright vicious and corrupting one." For "[i]f we were to add motives of personal avarice to other prompters of official zeal, the time might come when the scandals of law-enforcement would exceed the scandals of its violation." *Id.* at 560. In another observation especially relevant to this case, Justice Jackson pointed out that a parasitical suit brought by an informer based upon government information while a government investigation is under way will prematurely disclose the information in the possession of the government to the defendant and will greatly prejudice the government's case. *Id.* at 561.[8]

Congress acted immediately and decisively after *Hess* to amend the statutory language to emphasize that the purpose of the False Claims Act is to "protect the Treasury," that parasitical suits based upon information already known to the government do not protect the Treasury, they deplete it, and that parasitical suits are prohibited under the Act. Congress

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[7] Two months after the Hess decision, 18 of 19 pending *qui tam* suits were parasitical actions based on information obtained from indictments, 89 Cong. Rec. 7571, 78th Cong., 1st Sess. (1943). Within six months the number had risen to 28, *id.* at 7437, and within a year the number of parasitical suits had risen to 250. *Id.* at 10845-46.

[8] *See also United States v. Baker-Lockwood Mfg. Co.*, 138 F.2d 48, 53 (8th Cir. 1943) ("Diligence in the enforcement of the false claims statute requires of the Department of Justice the careful and orderly investigation and preparation of the action to be brought, in order that the Government may be able, when the suit is filed, to prosecute it with fairness to the defendants charged as well as to the public."), *vacated on other grounds*, 321 U.S. 744 (1944).

reiterated that the purpose of the False Claims Act informer's provision is to reward only "genuine informers," *i.e.*, those who bring independent information to the lawsuit. S. Rep. No. 291, 78th Cong., 1st Sess. 1, 2 (May 24, 1943); 89 Cong. Rec. 7608, 78th Cong., 1st Sess. (1943) (Statement of Senate Manager Van Nuys) (only "honest informer" should receive reward, not "racketeers"). Congressmen uniformly expressed their dismay that the False Claims Act had been interpreted to permit a private individual "having no scintilla of" independently derived evidence to obtain an informer's reward based solely on the parasitical use of government information. 88 Cong. Rec. 9138, 77th Cong., 2d Sess. (1942) (Statement of Sen. Van Nuys, Senate Sponsor of 1943 amendment).[9]

In particular, Congress was concerned that *Hess* created an incentive "for dishonest and unscrupulous investigators to turn over information to their friends or coconspirators for the purpose of bringing suit against our citizens on information * * * which comes to them in their official capacity as a representative of the United States." 89 Cong. Rec. 10846, 78th Cong., 1st Sess. (1943) (Statement of House Manager Rep. Walter). House Manager Hancock similar pointed out that, under *Hess*, "[t]he temptation and the opportunity is tremendous under the present law for renegotiators, contracting officers of the various purchasing agencies of the Government, and agents for collectors of internal revenue to take advantage of the information they discover in the course of the[ir] [government] business to enrich themselves by instigating informer's suits. That is a temptation we wish to remove." 89 Cong. Rec. 10849.[10]

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[9] The Manager of the House bill termed the Court majority's reasoning "tortuous." 89 Cong. Rec. 10846, 78th Cong., 1st Sess. (1943).

[10] Congress pointed out that even if the 1863 statute could be interpreted to permit suits based upon information in the possession of the government, such a provision would have been justified only because the government had no investigative resources in 1863: the Attorney General had no staff,

Reflecting the concerns set forth above, the Senate and House bills permitted only those informer's suits that were "based upon information, evidence, and sources original with" the informer, and the bills took away federal court jurisdiction over any suit based, *inter alia*, upon information, "obtained by the United States in the course of any investigation." S. Rep. No. 291, *supra* at 1-2 (1943); 89 Cong. Rec. 10744, 78th Cong., 1st Sess. (1943) (House bill). The conference bill that was enacted into law, Pub. L. No. 213, ch. 377, 57 Stat. 608 (Dec. 23, 1943),[11] edited and shortened this language, 89 Cong. Rec. 10745, but incorporated its essence: that informer's suits based upon information and evidence obtained by the United States in the course of an investigation are considered "parasitical actions" that are not permitted under the Act. *United States v. Rippetoe*, 178 F.2d 735, 736 (4th Cir. 1949); *United States ex rel. Davis v. Long's Drugs*, 411 U.S. 1144, 1152 (S.D. Calif. 1976) (apparent that purpose of 1943 amendment is to bar "parasitical suit"); *United States*

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there were no federal agency investigators, and the Federal Bureau of Investigation did not exist. S. Rep. No. 291, *supra* at 2; 89 Cong. Rec. 7608, 78th Cong., 1st Sess. (1943) (Statement of Senate Sponsor Van Nuys); *id.* at 10845 (Statement of House Manager Walter); *see United States ex rel. Bayarsky v. Brooks*, 154 F.2d 344, 345 (3d Cir.), *cert. denied*, 329 U.S. 716 (1946).

[11] The 1943 amendments to the informer's provision were originally codified at 31 U.S.C. § 232(C) (1976), which provided that the district courts have no subject matter jurisdiction over an informer's suit that is "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." In 1982, the amendment was recodified with a minor updating of its language at 31 U.S.C. § 3730(b)(4) (1982), which provided that the courts have no subject matter jurisdiction if "the action is based on evidence or information the Government had when the action was brought." The 1943 amendments also gave the government a right for the first time to intervene in the informer's action and to exclude the relator from participation; in such an event, the informer's share of the recovery—50% under the 1863 law—would be reduced to 10%. In the event that the United States did not intervene, the relator's share was cut from 50% to 25%.

ex rel. Weiss v. Schwartz, 546 F. Supp. 422, 424 (N.D. Calif. 1982) (same).

B. Section 3730(e)(4)(A) Continues In Effect The 1943 Bar Upon Informer's Suits Based Upon Information Developed By The Government

In 1986, Congress changed the language of the parasitical suit jurisdictional bar for one reason: to create a greater incentive for informers with *new* information to bring that information to the attention of the government. This goal was achieved in part through the overrule of case law that had outlawed an important category of *non*parasitical suits: the Courts of Appeal had uniformly held that a private informer would be barred from suit under the 1943 amendments where the information in the possession of the government was not the result of any effort by salaried government employees but had in fact been given to the government in advance of suit by the private informer.[12]

In 1986 Congress changed the language of the jurisdictional bar in order to eliminate this restriction upon genuine informers.[13] Nowhere in the extensive legislative

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[12] *Safir v. Blackwell*, 579 F.2d 742, 746 (2d Cir. 1978), *cert. denied*, 441 U.S. 943 (1979); *United States v. Aster*, 275 F.2d 281, 283 (3d Cir.), *cert. denied*, 364 U.S. 894 (1960); *United States ex rel. Weinberger v. Florida*, 615 F.2d 1370, 1371 (5th Cir. 1980); *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1103 (7th Cir. 1984); *Pettis ex rel. United States v. Morrison-Knudson Co.*, 577 F.2d 668, 669 (9th Cir. 1978); *see United States ex rel. Lapin v. IBM*, 490 F. Supp. 244, 247 (D. Haw. 1980) (same); *see also United States ex rel. MacFarlane v. Hutchinson*, 519 F. Supp. 563, 564 (D. Col. 1981) (fact that informer brought additional relevant information to government's attention after suit was filed did not entitle him to informer's reward where original suit was based on information in the possession of the government).

[13] The goal of encouraging genuine informers—those in the possession of new information not known to the government—to come forward was also achieved by increasing the informer's share of recovery, 31 U.S.C. § 3730(d)(1) & (2); allowing the informer a continuing role in a

history to the 1986 amendments does Congress state that it intended to make *any* change to the underlying parasitical suit bar that it had addressed in great detail in 1943. *See United States v. Ryans*, 284 U.S. 167, 173, 175 (1931) (new statutory codification should not be interpreted as incorporating a radical change from a prior codification without any indication that this change was intended).[14]

The 1986 version of the jurisdictional bar, 31 U.S.C. § 3730(e)(4)(A), overrules adverse case law restricting genuine informers and continues the existing bar on parasitical suits by providing as follows: "No court shall have jurisdiction over an [informer's] action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative or Government Accounting Office report, hearing, audit, or investigation, or from the news media."

This language was intended to address all normal routes of information flow from within the government to the private sector, and to preclude private individuals from plagiarizing the types of government information that would normally be available to them to file an informer's suit. While allowing a private person to inform the government about fraud without cutting off his *qui tam* rights, Section 3730(e)(4)(A), as the section-by-section analysis contained in the House Report makes clear, continues generally to preclude any action that is based on "*information already available to the Government*." H.R. Rep. No. 660, 99th Cong., 2d Sess. 30 (June 26, 1986). *See United States ex rel. Dick v. Long Island Lighting Co.*, 710 F. Supp. 1485, 1486 (E.D.N.Y. 1989) ("Information already known to the government may not be the basis for a

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False Claims Act lawsuit once the government had taken over its prosecution, *id.* § 3730(c); and allowing the informer to recover his attorney's fees, *id.* § 3730(d)(2).

[14] *See also United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (Court looks to history in interpreting False Claims Act language).

successful qui tam action."), *aff'd*, 912 F.2d 13 (2d Cir. 1990). The section-by-section analysis does not distinguish between information in the possession of the government that has been released to the public at large, and government information that has been obtained in another manner. The information upon which this case was based was not only developed by the government, but also the government had an open investigation of the facts alleged in the complaint at the time the suit was brought. Under the statutory language and the section-by-section analysis, this action is barred because it is based solely upon information developed by and available to the government.

In 1986, Congress did not incorporate into the statute specific language addressing the parasitical use of *non*public government information because it did not need to; government investigations and investigatory files are immune from disclosure under various governmental privileges, and Congress never entertained the idea that private individuals could circumvent the section 3730(e) bar on parasitical use of information developed by the government simply by obtaining confidential government investigatory materials from their friends in public service, let alone that public employees could themselves use this information. Such actions are included within the bar on uses of publicly disclosed government information.

Appellant asks this Court to adopt an interpretation of section 3730(e)(4) that would prohibit only suits based on a narrowly defined set of disclosures of government information and that would allow suits based on disclosures of such information from a government employee to himself or from a government employee to his friends or cohorts as long as that information had not yet been made available to the general public. Such a distinction is irrational, would encourage the trafficking in confidential government investigatory materials, would lead to premature disclosure of government investigations and evidence to targets of criminal and civil

investigations, and would encourage dereliction of duty by government employees.

The facts of this case are a good illustration of the concrete harm to the public interest that would result from the interpretation of the False Claims Act that appellant urges this Court to adopt. Mr. Williams is a government attorney who fulfilled his official duties as a contract law attorney admirably by analyzing contracts awarded over a period of ten years by a U.S. contracting office in Japan, and by bringing to his superiors' attention the fact that the bidding patterns on the contracts were consistent with bidrigging on the contracts. Once he had developed this information, Mr. Williams' responsibility was to refer the facts that he had gathered to the government units—the Air Force Office of Special Investigations, the Department of Defense Inspector General, or the Department of Justice—that are given the mandate by Congress to investigate and prosecute such cases. Lured by the incentive of a possible recovery of up to 30% of the government's damages under the False Claims Act, 31 U.S.C. § 3730(d)(2), however—in a case where the asserted single damages are in the tens of millions of dollars—Mr. Williams engaged in a series of actions that were not in the best interest of the government. He disclosed his official report, containing both "official use only" bid information and confidential government investigatory material, to a third party source as a reward, and the third party then disclosed it to one of the targets of the investigation. He allowed the unit within his agency charged with conducting investigations of these types of allegations a mere several weeks to investigate a case prior to filing his own for-profit suit—this, in a complex case that the government has now spent almost two years investigating—in the process of apparently tipping off the defendant to the government's investigation by releasing sealed and confidential documents to an industry publication.

There is absolutely no indication in the statute or legislative history that Congress intended to establish these sorts of perverse incentives for government employees when it

amended the False Claims Act in 1986, and in fact the legislative history shows that Congress had the opposite intent, to preclude *any* parasitical suits based upon information developed by the government.

The original House and Senate bills would have permitted a "very limited" category of suits based upon information in the possession of the government to go forward where the information had been in the possession of the government for six months, but the government had failed to act. S. Rep. No. 345, 99th Cong., 2d Sess. 16 (July 28, 1986), *reprinted in* 1986 U.S. Code Cong. & Ad. News 5266, 5281; S. 1562, *see* Subcomm. on Admin. Prac. & Proc., Senate Comm. on the Judiciary, *False Claims Reform Act: Hearing on S. 1562*, S. Hrg. No. 452, 99th Cong., 1st Sess. 7 (Sept. 17, 1985); H.R. 4827, 99th Cong., 2d Sess. at 6 (May 15, 1986). The conference committee ultimately concluded, however, that this provision was unworkable and unwarranted, and the provision was dropped. 132 Cong. Rec. 29322 (Oct. 7, 1986).[15] As one court has summarized, the Act actually enacted into law thus "eliminated the provisions [in the early House and Senate bills] which were intended to allow citizens without direct information of the fraud to prompt the Government to act on information already in its possession as proposed in the original Senate bill." The 1986 amendments as ultimately enacted, therefore, *"continued to bar the same type of 'parasitical suits' based on publicly disclosed information which were the concern of Congress in 1943." United States*

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[15] The legislative history to the informer's provision must therefore be read with caution, because both the House and Senate reports to the 1986 amendments are based upon bills which incorporated the provision allowing parasitical suits after six months. S. Rep. No. 345, *supra* at 28, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5266, 5293; H.R. Rep. No. 660, *supra* at 5, 42-43. In fact, the cases primarily relied upon by appellant in this case—*Erickson v. American Institute of Biological Sciences*, 716 F. Supp. 908 (E.D. Va. 1989), and *United States v. CAC-Ramsey, Inc.*, 744 F. Supp. 1158 (S.D. Fla. 1990) rely heavily upon legislative history to the draft provisions that were *dropped* from the bill enacted into law.

ex rel. LaValley v. First Nat'l Bank of Boston, 707 F. Supp. 1351, 1356 (D. Mass. 1988) (emphasis added); *see United States ex rel. Stinson v. Provident Life Ins. Co.*, 736 F. Supp. 614, 617 (D.N.J. 1990) (appeal pending).

Appellant's argument contra is premised in its entirety upon its constricted interpretation of the word "public" in section 3730(e)(4); appellant contends that by outlawing suits based upon only "public" disclosures, Congress demonstrated that it wanted to change existing law to bar *only* suits based on specific types of "public" disclosures of government information, and to *allow* suits based on any other type of disclosure of government information. The legislative history as well as the language of section 3730(d)(1)[16] demonstrate, however, that Congress referred to "public" disclosures in its broadest sense and was concerned principally with the use of government information.[17] Moreover, the reason that the

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[16] The term "public" contained in section 3730(e)(4) is not a term of art, and therefore "takes color from its surroundings." *United States v. American Trucking Ass'ns*, 310 U.S. 534, 545 (1940).

[17] The original House and Senate drafts of section 3730(e)(4) did not include the word "public" but referred solely to information "which the Government disclosed" as the type of information upon which an informer's suit could not be based. *See* S. 1562, *reprinted in* S. Hrg. No. 452, *supra* at 6; *id.* as reported on July 28, 1986, *see* S. Rep. No. 345, *supra* at 30 (July 28, 1986), *reprinted in* 1986 U.S. Code Cong. & Ad. News 5266, 5295; H.R. 4827, § 3730(b)(5) (May 15, 1986); *id.* as amended June 26, 1986. Originally, draft sections 3730(d)(1) and (e)(4) were parallel provisions: 3730(e)(4) outlawed suits based entirely on government disclosures, and 3730(d)(1) allowed suits based in part on government disclosures but reduced the informer's share to 10% of the recovery in such cases. Neither provision limited those disclosures of government information covered by the two sections solely to "public" disclosures. It was not until an amendment (No. 2701) introduced by Senator Grassley in the nature of a substitute bill on August 11, 1986, that the word "public" first appears to describe the types of disclosures upon which an informer's suit could not be based under 3730(e)(4); however, the parallel 3730(d)(1) was not changed, indicating that the drafters of the substitute (e)(4) did not believe that they had changed the substance of the original draft bill and that they attached no

jurisdictional bar focused in the first instance upon "disclosures" rather than "information" is that the bill as originally drafted would have permitted the informer to bring a parasitical suit based on information already in the possession of the government once six months had elapsed from the date of "disclosure" of that information and the government had taken no action. Once that proposal was rejected, the original "disclosure" language or the substitute "public disclosure" language as the time from which to measure the six-month period no longer became as significant. To be sure, Congress still wanted to bar suits based on public disclosures, as one form of non-permitted parasitical suit, but that in and of itself provides no support for appellant's argument that in 1986 Congress intended, for the first time, to permit informer's suits based upon information obtained from the government in other manners and that the government is actively pursuing through its own investigative processes.

In any event, Mr. Williams' suit is indeed based upon a "public disclosure" of information in a government "investigation," within the language of section 3730(e)(4). While no "public disclosure" occurs when a government employee transmits information to another government employee as a part of their mutual official duties, every government employee has a dual status. When acting in an official capacity the employee is an arm of the government, *see* 28 U.S.C. § 2679(d)(1) (acts of employee acting within scope of federal employment are attributable to United States government); 44 Comp. Gen. 312 (1964) (same), and as such, the employee's efforts, as well as the information and

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particular significance to the word "public." 132 Cong. Rec. 20531, 99th Cong., 2d Sess. (Aug. 11, 1986). In the discussion of the conference reconciliation, which adopted the Senate language, there is no discussion of the term "public," nor is there any indication that Congress was aware that 3730(d)(1) (still referring to all "disclosures") and 3730(e)(4) (now referring to "public" disclosures) were no longer parallel under the substitute bill. 132 Cong. Rec. 28570, 28580 (Oct. 3, 1986); 132 Cong. Rec. 29315, 29321 (Oct. 7, 1986).

knowledge that he gains by reason of his employment, are the government's property. *See Snepp v. United States*, 444 U.S. 507 (1980) (per curiam); H. Con. Res. 175, 72A Stat. B12, 85th Cong., 2d Sess. (1958) (information obtained in performance of government duties belongs to the government); Exec. Order No. 11222, §§ 203, 205 (1965), *reprinted in* 3 C.F.R. 306 (1964-65 Comp.); Exec. Order No. 12674, § 101(c) (1989), *codified at* 5 U.S.C. § 7301 note; 5 C.F.R. §§ 735.204(a)(2), -2.06; 32 C.F.R. §§ 40.4(b)(2), -(c)(7)(1) (all same); *Restatement (Second) of Agency* §§ 387, 388, 404 (1958). As long as the employee uses official information only in his official capacity for the purpose of furthering the government's business, no disclosure occurs because the information has never left the government.

In contrast, when the employee seeks to use government information outside the scope of his employment, the employee reverts to a status as a private member of the public.[18] When he seeks to use government information to file his own personal informer's suit, he acts not within his official capacity, but as a private person with respect to that information. Under these circumstances, the information has been "disclosed" to a member of the "public" within the meaning of 31 U.S.C. § 3730(e)(4) because the government employee *qua* informer is acting in his private capacity. He has in essence appropriated government information or property for his own use, no less than if he took a government vehicle home and used it for purely personal enjoyment.[19]

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[18] This distinction between a government employee in his public versus his private capacity is hardly novel; courts routinely make this distinction under, for example the Federal Tort Claims Act, 28 U.S.C. § 2671, *see Hartzell v. United States*, 786 F.2d 964 (9th Cir. 1986), and under the Federal Employees Compensation Act, 5 U.S.C. § 8102, *see Wallace v. United States*, 669 F.2d 947, 952-54 (4th Cir. 1982).

[19] Here, the information is encompassed in a government "investigation" within the language of § 3730(e)(4)(A). Mr. Williams was Chief of the Contract Law Section at the Yokota Base and his job responsibilities included investigating and reporting any contract fraud of which he because aware. His current use of information that he obtained in the course of his investigation is thus a use barred by § 3730(e)(4)(A).

Thus, even under the constricted interpretation of section 3730(e)(4) urged upon this Court by appellant, Mr. Williams' suit would be barred.

In his fight against fraud, the Attorney General must rely on large numbers of investigators, auditors, attorneys, and other government personnel. If these employees could file informer's complaint for their own private profit based upon information that they develop during the course of a government investigation, the incentive would be nearly overwhelming, as it was for Mr. Williams, to file suit before the government investigation is complete and referred to the Attorney General for prosecution. The Attorney General would face the prospect of races to the courthouse to file suits based upon facts that are only in a preliminary stage of investigation, with corresponding disclosure to the potential defendant of the existence of the inquiry and undermining of the government's case. The skewed incentives created by such a rule would wreak havoc upon the Attorney General's anti-fraud program, and would have an adverse effect upon personnel management within the government.

Without even any *hint* in the extensive legislative history that Congress intended to encourage such trafficking in government information, or to create an incentive for salaried government employees who have the duty to investigate and prosecute fraud against the government in consideration of that salary, to receive additional amounts for doing their government job through a False Claims Act informer's suit, appellant's interpretation should be rejected.[20] The language

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[20] It is a cardinal principle of statutory interpretation that statutes should not be applied in a manner that will lead to absurd results, and "the reason of the law" should "prevail over its letter" where the letter would lead to

of the statute should be interpreted in light of the purpose of the informer's provision, which is to provide an incentive for original sources of information to come forward with new information not in the possession of the government.[21] Mr. Williams did not need the incentive of an informer's reward to come forward with his suit; he was required as a condition of his employment to provide the information he developed in the course of his employment to his employer, the United States government.[22] The government was itself pursuing the information at the time Mr. Williams filed his suit, and allowing a recovery to Mr. Williams in these circumstances would deplete the Treasury by diverting part of a recovery that

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plainly unintended consequences. *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940); *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-87 (1869); *St. Vincent's Hospital v. King*, 901 F.2d 1068, 1071 (11th Cir. 1990). "[E]ven when the plain meaning d[oes] not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' th[e] Court has followed that purpose, rather that the literal words." *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940).

[21] The Supreme Court has recognized that in interpreting the language of the False Claims Act, the Court should be guided by the "evident legislative purpose in enacting the law." *United States v. Bornstein*, 423 U.S. 303, 310 (1976). Similarly, the courts of appeals have stated that, in interpreting the Act, the "fundamental task" is "to give effect to the intent of Congress." *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 17 (2d Cir. 1990) (inserting limiting language into § 3730(e)(4)(B) that furthers the purpose of the Act).

[22] *See* Exec. Order No. 12674, § 101(k) (Apr. 12, 1989), *reprinted after* 5 U.S.C. § 7301 note ("all executive branch employees" have a duty to "disclose waste, fraud, abuse, and corruption to appropriate authorities"); H. Con. Res. 175, 72A Stat. B12, 85th Cong., 2d Sess. (1958) (information obtained in performance of government duties belongs to the government); Exec. Order No. 11222, §§ 203, 205 (1965), *reprinted in* 3 C.F.R. 306 (1964-65 Comp.); Exec. Order No. 12674, § 101(c) (1989), *codified at* 5 U.S.C. § 7301 note; *Restatement (Second) Of Agency* § 381 (1958) (agent must give principal information "relevant to affairs entrusted to him" and that "the principal would desire to have").

is designed to make the government whole, and that the government would have obtained on its own initiative, to an informer who brought nothing obtained outside the scope of his government employment to the lawsuit.

* * *

CONCLUSION

For all of the above reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

HUGHES AIRCRAFT COMPANY, PETITIONER

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The False Claims Act prohibits a variety of fraudulent or deceptive practices involving government funds and property. 31 U.S.C. 3729. The Act authorizes individual citizens (known as "relators") to bring private suits, commonly referred to as *qui tam* actions, to enforce the Act for the benefit of the United States. 31 U.S.C. 3730(b)(1). A 1986 amendment to the Act provides that "[n]o court shall have jurisdiction over [a *qui tam*] action * * * based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." 31 U.S.C. 3730(e)(4)(A). The questions presented in this case are as follows:

1. Whether Section 3730(e)(4)(A) applies to the instant suit, which was filed after the effective date of the 1986 amendments but alleged pre-amendment violations.

2. Whether the court of appeals erred in holding that no "public disclosure" had occurred in this case.

3. Whether injury to the public fisc is an essential element of a False Claims Act suit.

4. Whether the *qui tam* provisions of the False Claims Act are constitutional.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1340

HUGHES AIRCRAFT COMPANY, PETITIONER

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATUTORY PROVISION INVOLVED

Section 3730 of Title 31, United States Code, is reprinted as an appendix to this brief.

STATEMENT

1. The False Claims Act (FCA or Act) prohibits any person from "knowingly" presenting "a false or fraudulent claim for payment or approval" to the federal government. 31 U.S.C. 3729(a)(1). The Act also prohibits a variety of related deceptive practices involving govern-

ment funds and property. 31 U.S.C. 3729(a)(2)-(7). Any person who violates the Act is liable to the United States for treble damages and a civil penalty of up to $10,000 for each violation. 31 U.S.C. 3729(a).

The Attorney General may bring a civil action against an alleged violator. 31 U.S.C. 3730(a). The Act also authorizes individual citizens (known as "relators") to bring private suits, commonly referred to as *qui tam* actions. 31 U.S.C. 3730(b)(1).[1] The Act provides that a *qui tam* action is brought "for the person [the relator] and for the United States Government." *Ibid.* When a *qui tam* action is filed, the government may intervene to take over the litigation "within 60 days after it receives both the complaint and the material evidence and information," 31 U.S.C. 3730(b)(2), or "at a later date upon a showing of good cause," 31 U.S.C. 3730(c)(3). If the government elects not to intervene, the relator "shall have the right to conduct the action." *Ibid.*

Any monetary recovery in a *qui tam* action is divided between the government and the relator. In cases in which the government does not intervene and the relator conducts the action, the relator receives between 25 and 30 percent of the proceeds of the action or settlement, while the United States receives the rest. 31 U.S.C. 3730(d)(2). If the government intervenes and prosecutes the action, the relator generally receives between 15 and 25 percent of the proceeds. 31 U.S.C. 3730(d)(1).[2]

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[1] "Qui tam" is a shortened version of the Latin phrase "qui tam pro domino rege quam pro se ipso in hac parte sequitur," which means "who brings the action for the king as well as for himself." See *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 746 n.3 (9th Cir. 1993), cert. denied, 510 U.S. 1140 (1994).

[2] The Act provides, however, that "[w]here the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation." 31 U.S.C. 3730(d)(1).

In *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 545-548 (1943), this Court held that a *qui tam* suit under the FCA could go forward even if the allegations in the complaint were derived entirely from a criminal indictment filed by the government in a related case. Congress amended the Act shortly thereafter to preclude such "parasitical" actions. See Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 609; *United States ex rel. State of Wisconsin* v. *Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984) ("Congress's immediate concern in enacting the 1943 amendments was to do away with the 'parasitical suits' allowed by *Hess*"). From 1943 to 1982, the FCA provided that "[t]he court shall have no jurisdiction to proceed with any [*qui tam*] suit * * * whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." 31 U.S.C. 232(C) (1976). The substance of that jurisdictional bar was carried forward when the Act was recodified in 1982. See Act of Sept. 13, 1982, Pub. L. No. 97-258, § 1, 96 Stat. 979. Thus, as of 1982, the Act provided that "the court shall dismiss [a *qui tam*] action * * * on discovering the action is based on evidence or information the Government had when the action was brought." 31 U.S.C. 3730(b)(4) (1982).

Those versions of the jurisdictional bar were consistently construed by the courts to preclude *qui tam*

actions even where the government had made no effort to investigate allegations of fraud, see S. Rep. No. 345, 99th Cong., 2d Sess. 12 (1986), and even where the relevant information had been brought to the government's attention by the relator himself, see *id.* at 12-13 (citing *State of Wisconsin*, *supra*). To address those concerns, Congress amended the jurisdictional bar in 1986. The current version of the bar provides:

> No court shall have jurisdiction over [a *qui tam*] action * * * based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless * * * the person bringing the action is an original source of the information.

31 U.S.C. 3730(e)(4)(A).[3]

2. This case involves a *qui tam* action filed in January 1989 by respondent William J. Schumer, then an employee of petitioner Hughes Aircraft Company. Respondent alleged that petitioner had developed and built radar components for use in its government contracts for both the B-2 bomber and the F-15 fighter plane that should have been charged entirely to the F-15 contract. Respondent contended that petitioner had violated the FCA by creating an internal "commonality agreement" that allowed the company to charge the costs of those radar components in part to the B-2 contract. See Pet. App. 3a-4a. After investigating respondent's allegations,

[3] The Act defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. 3730(e)(4)(B).

the Department of Justice declined to intervene to take over the litigation. *Id.* at 4a. Respondent then pursued the action without participation by the government.

3. Petitioner moved to dismiss the suit on several grounds unrelated to the merits of respondent's allegations. Petitioner noted that the FCA violations were alleged to have occurred before the 1986 amendments to the Act. It argued that the suit should be governed by the law in effect at the time of the alleged violations, and that respondent would have been barred from pursuing this matter under the jurisdictional bar found in the Act at that time. Petitioner also contended that respondent's suit was "based upon" a "public disclosure" of "allegations or transactions in a[n] * * * administrative * * * audit" and was therefore foreclosed even under the jurisdictional bar as amended in 1986. Finally, petitioner argued that the Act's *qui tam* provisions are unconstitutional. The district court summarily denied petitioner's motions to dismiss. Pet. App. 34a-35a.

4. Petitioner subsequently moved for summary judgment on the merits of respondent's allegations. The district court granted that motion. See Pet. App. 36a-64a. The court found that petitioner had properly informed the government and other contractors of its use of the commonality agreements, and that no genuine issue of material fact existed as to whether petitioner had submitted a false claim. *Id.* at 4a, 64a.

5. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-31a.

a. The court first concluded that the case is governed by the current version of the FCA's jurisdictional bar provision, 31 U.S.C. 3730(e)(4), rather than by the version in effect at the time of the alleged violations. Under this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 274 (1994), the court of appeals explained,

there is "a strong presumption that jurisdictional statutes apply retrospectively." Pet. App. 6a. The court found nothing in the text or history of Section 3730(e)(4) to rebut that presumption. *Id.* at 7a.

b. The court of appeals next held that respondent's suit was not precluded by the current version of the FCA's jurisdictional bar because there had been no "public disclosure" within the meaning of Section 3730(e)(4)(A). The court rejected petitioner's contention that "the dissemination of government audits to employees of [petitioner and the prime contractor] who were not involved in the alleged fraud constituted public disclosure," Pet. App. 8a, explaining that, "in the context of defense procurement, security considerations generally require that the government, contractors, and subcontractors operate within a closed loop of secrecy," *id.* at 9a. The court held on that basis that "disclosure to company employees does not constitute public disclosure." *Id.* at 11a. The court of appeals also rejected petitioner's contention that the audits in question constituted "public disclosures" because they were potentially available to the public under the Freedom of Information Act (FOIA), 5 U.S.C. 552. See Pet. App. 11a-13a.[4]

c. Petitioner also challenged the constitutionality of the FCA's *qui tam* provisions. Petitioner contended that *qui tam* relators fail to satisfy Article III standing requirements; that the *qui tam* provisions violate separation of powers principles; and that the provisions violate limitations under the Appointments Clause, Art. II, § 2,

[4] Because the court concluded that there had been no "public disclosure" of the audits in question, it did not address the question whether respondent's suit was "based upon" those audits, or whether respondent was an "original source" of the allegations. Pet. App. 14a; see page 4 & note 3, *supra*.

Cl. 2, on who may conduct litigation on behalf of the United States. The court of appeals rejected those arguments on the basis of its prior decisions in *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 747-759 (9th Cir. 1993), cert. denied, 510 U.S. 1140 (1994), and *United States ex rel. Madden* v. *General Dynamics Corp.*, 4 F.3d 827, 830 (9th Cir. 1993). See Pet. App. 14a.

d. The court then considered respondent's appeal from the district court's decision granting summary judgment to petitioner on the merits of respondent's claims. The court concluded that genuine issues of material fact existed regarding the adequacy of petitioner's disclosure to its prime contractor, the Northrop Corporation, of its method of allocating the radar costs to the B-2 contract. See Pet. App. 19a-22a. The court also found genuine issues of material fact with respect to respondent's claim that petitioner had failed to comply with the cost accounting statements (CAS) that it was required to submit to the government. See *id.* at 22a-26a.

ARGUMENT

The court of appeals correctly resolved the questions presented in the petition. Further review is not warranted.

A. Petitioner contends (Pet. 9-11) that the court of appeals erred in applying the current version of the FCA's jurisdictional bar to respondent's suit, which alleged that violations of the Act had occurred before the effective date of the 1986 FCA amendments.

1. In *Landgraf* v. *USI Film Products*, 511 U.S. 244, 265 (1994), this Court recognized that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." The Court also observed, however, that "[a] statute does not operate 'retrospectively'

merely because it is applied in a case arising from conduct antedating the statute's enactment." *Id.* at 269. The Court noted, in particular, that it had "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274. The Court explained that "[p]resent law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Ibid.* (internal quotation marks omitted); see also *id.* at 292 (Scalia, J., concurring in the judgments) (noting the Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction").

Both the current Section 3730(e)(4) and its predecessor version have governed the jurisdiction of the district court rather than the substantive rights and obligations of the parties. See Pet. App. 6a-7a; *United States ex rel. Kreindler & Kreindler* v. *United Technologies Corp.*, 985 F.2d 1148, 1157 (2d Cir.), cert. denied, 508 U.S. 973 (1993); *United States ex rel. Precision Co.* v. *Koch Indus.*, 971 F.2d 548, 551 (10th Cir. 1992), cert. denied, 507 U.S. 951 (1993); *Houck ex rel. United States* v. *Folding Carton Admin. Comm.*, 881 F.2d 494, 504, 506 & n.9 (7th Cir. 1989), cert. denied, 494 U.S. 1025, 1026, 1027 (1990). Replacement of former Section 3730(b)(4) with the current "public disclosure" provision neither prohibited previously lawful conduct nor increased the penalties for violations. The amendment therefore did not alter either the existence or the extent of petitioner's liability to the government; it simply expanded the circumstances under which *qui tam* relators may file suit to enforce that liability. See Pet. App. 7a. Application of the current Section 3730(e)(4) to the instant suit is thus consistent with this Court's precedents.

2. Petitioner contends (Pet. 9-10) that review is warranted to resolve a conflict between the decision in the instant case and that of the Sixth Circuit in *United States* v. *TRW, Inc.*, 4 F.3d 417, 422-423 (1993), cert. denied, 114 S. Ct. 1370 (1994). The court in *TRW* considered the applicability of the 1986 FCA amendments to two *qui tam* complaints alleging pre-amendment violations. The court concluded that "the provisions that govern are those that were in effect at the time the conduct that is the subject of the litigation occurred." *Id.* at 423 (footnote omitted); see also *id.* at 426.[5]

The decision in *TRW* predated this Court's ruling in *Landgraf*. The *TRW* court did not address the question whether Section 3730(e)(4)'s limitation on *qui tam* actions (or the stricter limitation formerly contained in 31 U.S.C. 3730(b)(4) (1982)) was properly characterized as a "jurisdictional" rule for purposes of retroactivity analysis. In light of this Court's intervening decision in *Landgraf*, it is not clear that the Sixth Circuit would adhere to the conclusion that Section 3730(e)(4) is inapplicable to suits alleging pre-amendment violations. We therefore do not believe that there is currently an irreconcilable circuit conflict on this question.

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[5] One of the complaints at issue in *TRW* was filed before the effective date of the 1986 amendments; the other was filed after that date. Both complaints alleged pre-amendment violations. The government argued that the pre-amendment jurisdictional bar applied to the first complaint, see Brief for the United States at 22-24 (Nos. 91-3784 & 92-3066), but that the jurisdictional provisions of the 1986 amendments applied to the second complaint, see *id.* at 45-47. The Sixth Circuit held that the 1986 amendments did not apply to either complaint. See 4 F.3d at 423; *id.* at 426 (concluding that "the 1982 provisions [of the FCA] apply because [the second complaint], although filed in 1987, was based on TRW's conduct, which occurred prior to the enactment of the 1986 amendments"). The instant *qui tam* action was filed after the effective date of the 1986 amendments. See Pet. App. 4a.

3. The effective date of the statutory amendment at issue here is October 27, 1986. See False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153. The longest statute of limitations under the FCA, including equitable tolling, is ten years. 31 U.S.C. 3731(b)(2). As of October 27, 1996, new cases involving claims arising before the passage of the 1986 amendments will be barred by the statute of limitations. Even if a square circuit conflict existed, the question presented therefore is not of sufficient continuing importance to warrant this Court's review.

B. Petitioner next contends that respondent's suit is barred even if current Section 3730(e)(4) is applicable to the instant case. Petitioner argues that (1) the disclosure of government audits to petitioner's own employees constituted a "public disclosure" within the meaning of Section 3730(e)(4) (Pet. 11-15), and (2) the potential availability of the government audits pursuant to the FOIA likewise constituted a "public disclosure" (Pet. 16-18).

1. The Ninth Circuit held in the instant case that disclosure of government audits to petitioner's own employees did not constitute a "public disclosure" within the meaning of Section 3730(e)(4). Pet. App. 8a-11a. In the court's view, disclosures to a contractor's employees, like exchanges of information between officials within the government, "involve the release of information within a private sphere." *Id.* at 10a. Petitioner contends that review by this Court is warranted to resolve a conflict between the Ninth Circuit's decision in the instant case and that of the Second Circuit in *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318 (1992).

In *Doe*, federal investigators executed a search warrant on the premises of a corporation suspected of defrauding the government. 960 F.2d at 319. The agents interviewed a number of the company's employees,

explaining that they were investigating allegations of fraud. *Id.* at 319-320. An attorney retained by one of the employees subsequently filed a *qui tam* action against the company. *Id.* at 320. The Second Circuit held that Section 3730(e)(4) barred the relator's *qui tam* suit because "the allegations of fraud * * * were actually divulged to strangers to the fraud, namely the innocent employees of John Doe Corp." *Id.* at 322 (emphasis omitted). The court noted that, "[w]hen these innocent employees learned of the fraud, they were under no obligation to keep th[e] information confidential." *Id.* at 323. The court rejected the relator's contention that disclosure to those employees was insufficient to place the allegations in the public domain, concluding that there was "no principled distinction between defendants' customers and defendants' innocent employees" because "both are members of the public." *Ibid.*

The Ninth Circuit believed that its decision in the instant case conflicted with the ruling in *Doe*. See Pet. App. 9a (court of appeals "decline[d] to adopt the rule of *Doe* for application in this circuit," stating that "the *Doe* court's treatment of company employees as members of the public is unrealistic"). In our view, however, the holdings are reconcilable.

The question whether information revealed to a corporate defendant's employees is the subject of a "public disclosure" cannot appropriately be resolved on the basis of a per se rule. Rather, the application of the jurisdictional bar depends upon the circumstances under which the information is revealed, including the employee's freedom (or lack thereof) to transmit the information to the general public. An agency record released to an employee of a corporate defendant in response to a FOIA request, for example, would surely constitute a "public disclosure." The employee would receive the record in his capacity

as a member of the public, and his status as a corporate employee would place no restrictions on his entitlement to disseminate the material to a wider audience. By contrast, no "public disclosure" would occur if the government revealed information to a corporate employee upon the condition that he would not convey it to others.

The Ninth Circuit's conclusion that there was no "public disclosure" of the audit reports at issue in the instant case is consistent with the foregoing principles. We are aware of no evidence suggesting that the reports were divulged by the government to any Hughes employees other than those designated to receive them by top Hughes management. The employees designated by petitioner presumably received the reports upon the understanding that they would use the information contained therein only in furtherance of petitioner's business. The Ninth Circuit reasonably concluded that such a limited dissemination of the reports was insufficient to place them in the public domain.[6]

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[6] Petitioner also contends (Pet. 15 n.5) that the audit reports in question were provided to employees of the prime contractor (Northrop), and that disclosure of the reports to those employees constituted a separate "public disclosure." The only audit report disclosed to the prime contractor, however, was the classified Air Force Audit 86-5, which was not declassified until September 5, 1990, 19 months after this *qui tam* suit was filed. See Exhibit 1 to Affidavit of John F. Wilson, filed as Exhibit 62 to Hughes' Exhibits in Support of Motion for Summary Judgment, filed 1/27/92 (showing declassification stamp). Because that audit report was classified at the time the *qui tam* suit was filed, its disclosure to Northrop could not have qualified as a "public disclosure." The Northrop custodian of records was able to identify no other relevant government audit reports in Northrop's possession. See Declaration of Laurie L. Bilbruck and Attachments, dated 10/12/90, filed as Attachment D to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed 10/15/90.

The Second Circuit's decision in *Doe* is also consistent with the principles discussed above. The employees who were informed (directly by the government) of the allegations of fraud were no doubt interviewed because of their connection to the company and the consequent possibility that they might have knowledge of corporate wrongdoing. They acquired information from the government, however, not in the course or scope of their private employment, but essentially as members of the public who might have had knowledge of evidence relevant to the government's investigation. Those employees were therefore subject to no fiduciary or other comparable obligation to the employer to maintain the confidentiality of the information they acquired during their interviews. See 960 F.2d at 323 (employees interviewed "were under no obligation to keep th[e] information confidential"). Because the disclosures at issue in *Doe* were of a significantly different nature than those in the instant case, and because the public disclosure issue in each case was correctly decided, we believe that this question does not warrant further review.[7]

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[7] Contrary to petitioner's contention (Pet. 13), the Ninth Circuit's ruling does not deprive the government of adequate protection against "parasitic" *qui tam* actions. Where the government intervenes to take over a *qui tam* suit, the relator is generally entitled to between 15 and 25 percent of any monetary recovery. 31 U.S.C. 3730(d)(1). The relator in such cases may recover no more than 10 percent of the proceeds, however, if the action is "based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." *Ibid.*; see note 2, *supra*. That provision does not require that the "disclosures" in question be "public." Thus, even where the jurisdictional bar is inapplicable, the Act provides for a suitable reduction (to zero, if appropriate) of the relator's share of any recovery

2. The decisions of the Second and Third Circuits in *Kreindler & Kreindler*, 985 F.2d at 1158, and *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A.* v. *Prudential Insurance Co.*, 944 F.2d 1149, 1159 (3d Cir. 1991), do not support the proposition that the potential availability of government records under the FOIA constitutes a "public disclosure" within the meaning of Section 3730(e)(4)(A). Those cases involved discovery materials that had been placed in court files and were unquestionably available for the asking to any member of the public. See *Kreindler & Kreindler*, 985 F.2d at 1158; *Stinson*, 944 F.2d at 1159. Whether a federal agency record is accessible under the FOIA, by contrast, depends on whether it is covered by one of the exceptions to the FOIA's general disclosure requirements. See 5 U.S.C. 552(b). A "public disclosure" does occur when agency records are actually released to a member of the public pursuant to a FOIA request. See pages 11-12, *supra*. We are aware of no case, however, suggesting that an agency record can be deemed the subject of a "public disclosure," within the meaning of Section 3730(e)(4)(A), simply because a court concludes that a hypothetical FOIA request would result in release of the document.

C. Petitioner argues (Pet. 20-22) that injury to the public fisc is an essential element of a cause of action under the FCA. Any person who violates the FCA is liable, for each violation, "for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. 3729(a). As the Senate Report accompanying the 1986 FCA amendments explains, "[t]he United States is entitled to recover

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if the *qui tam* suit is "parasitic" in nature and makes no substantial contribution to the discovery or remediation of fraud.

[civil penalties] solely upon proof that false claims were made, without proof of any damages." S. Rep. No. 345, 99th Cong., 2d Sess. 8 (1986) (citing *Fleming* v. *United States*, 336 F.2d 475, 480 (10th Cir. 1964), cert. denied, 380 U.S. 907 (1965)). Accord *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 152-153 & n.5 (1956).[8]

The cases on which petitioner relies (see Pet. 21) do not support the proposition that injury to the public fisc is an essential element of a cause of action under the FCA. *United States* v. *American Heart Research Foundation, Inc.*, 996 F.2d 7, 9-10 (1st Cir. 1993), simply held that the underpayment of an obligation to the government did not constitute a "false claim." *United States ex rel. Glass* v. *Medtronic, Inc.*, 957 F.2d 605, 607-608 (8th Cir. 1992), held that the claim in question was not "false." The court in *United States* v. *Azzarelli Construction Co.*, 647 F.2d 757, 762 (7th Cir. 1981), did state that "the lack of any requirement of specific evidence of damages does not dispense with the need to establish an injury." The *Azzarelli* court also stated, however, that "the allegedly false claim must be one that is capable of causing an injury to the funds or property of the United States if the claim is in fact paid." *Id.* at 759. That formulation strongly suggests that the government may collect civil penalties under the FCA even where it avoids pecuniary injury by (for example) recognizing the fraudulent nature of a claim and refusing to pay it. Moreover, the holding of *Azzarelli*—that no FCA suit could be maintained based on fraud in a state highway

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[8] Petitioner's reliance (Pet. 21) on 31 U.S.C. 3731(c) is misplaced. As noted in the text, the FCA authorizes an award of three times the government's damages in addition to any civil penalty. Section 3731(c) simply makes clear that the amount of any such damages must be proved by a preponderance of the evidence. It does not suggest that the government must prove damages in order to recover civil penalties.

construction program partially funded by federal block grants, see *id.* at 762—has since been overruled by statute. See 31 U.S.C. 3729(c).[9]

D. Petitioner contends that the *qui tam* provisions of the FCA (1) violate Article III of the Constitution by permitting suits by persons who have not been injured by the alleged fraudulent conduct (Pet. 25-26), and (2) violate the Appointments Clause and separation of powers principles by allowing private individuals to conduct litigation on behalf of the United States (Pet. 23-25).

1. Petitioner does not contend that any conflict in authority exists regarding the constitutionality of the *qui tam* provisions.[10] As respondent points out (Br. in Opp.

[9] For the foregoing reasons, the second question presented in the petition—whether injury to the public fisc is an essential element of an FCA cause of action—does not warrant this Court's review. The government takes no position, however, regarding the merits of respondent's FCA claims or the correctness of the Ninth Circuit's holding that respondent had raised genuine issues of material fact.

[10] Petitioner notes (Pet. 22-23) that the Department of Justice's Office of Legal Counsel (OLC) previously took the position that the *qui tam* provisions of the FCA are unconstitutional. As respondent points out (Br. in Opp. 15 n.13), the OLC memorandum in question makes clear that, at the time it was written, significant disagreement existed within the Department of Justice regarding the proper resolution of the constitutional issues involved. The OLC memorandum was an internal recommendation to the Attorney General; it was not a formal OLC opinion. See 13 Op. Off. Legal Counsel 249, 286 (1989) (memorandum concludes by "recommend[ing] that [the Attorney General] authorize the Civil Division to enter an appropriate case and present the Executive Branch's arguments against the constitutionality of qui tam"). The Attorney General did not take a position on the issue in response to the OLC memorandum; the Department as a whole has never taken the position that the *qui tam* provisions are unconstitutional; and OLC itself has since formally disavowed the reasoning of the prior OLC memorandum regarding the Appointments Clause. See Memorandum for the General Counsels of the Federal Government, *The Constitutional Separation of Powers between the President and Congress* 20-21 n.53 (OLC May 7, 1996).

13-14), the courts of appeals that have considered the question have uniformly rejected the constitutional challenges advanced by petitioner in this case. See *United States ex rel. Taxpayers Against Fraud* v. *General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 747-759 (9th Cir. 1993), cert. denied, 510 U.S. 1140 (1994); *Kreindler & Kreindler*, 985 F.2d at 1153-1155.

2. a. "Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). The understanding of the Framers is central to interpreting Article III's delineation of federal judicial power. See *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment) ("'[t]he judicial Power of the United States' conferred upon this Court and such inferior courts as Congress may establish, Art. III, § 1, must be deemed to be the judicial power as understood by our common-law tradition"). *Qui tam* actions were common in England and in the States at the time the Constitution was adopted, and statutes permitting such suits to be filed in federal court were repeatedly enacted by early Congresses. See, *e.g.*, *Marvin* v. *Trout*, 199 U.S. 212, 225 (1905) (discussing long-standing acceptance of *qui tam* mechanism). The Framers' evident assumption that adjudication of *qui tam* actions is a proper exercise of the Article III judicial power weighs heavily in the constitutional analysis.

At least as a general matter, moreover, adjudication of *qui tam* actions by the federal courts is consistent with

the values underlying the case or controversy requirement. Article III standing doctrine serves "to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472. The case or controversy requirement thus confines federal courts to determining the "rights of individuals," rather than permitting litigation to be used to vindicate the "undifferentiated public interest" in the proper administration of federal law. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 576-577 (1992).

Qui tam suits are unlikely to enmesh the federal courts in abstract or hypothetical inquiries. To the contrary, adjudication of such actions requires the application of legal principles to concrete factual settings. Nor can *qui tam* relators plausibly be accused of using the legal system as a means of advancing an ideological agenda or pursuing their own notions of wise public policy. Rather, they seek to obtain an award of *money*, and thus possess the prototypical "concrete stake" in the outcome of the litigation. Thus, the consistent willingness of federal courts to adjudicate *qui tam* actions is not an historical anomaly; use of the *qui tam* mechanism is consistent with the values that the "case or controversy" requirement is intended to protect.[11]

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[11] The *qui tam* mechanism may be analogized to the assignment of a chose in action. See *Kelly*, 9 F.3d at 748-749. In *Spiller* v. *Atchison, Topeka & Santa Fe Railway*, 253 U.S. 117 (1920), the Court recognized that "[a] claim for damages sustained through the exaction of unreasonable charges for the carriage of freight is a claim not for a penalty but for compensation, is a property right assignable in its nature, and must be regarded as assignable at law, in the absence of any expression of a legislative intent to the contrary." *Id.* at 135 (citations omitted). The federal courts have consistently held that rights of action against insurers for bad faith refusal to settle claims are assignable. See, *e.g.*, *Bailey* v. *Prudence Mut. Casualty Co.*, 429 F.2d 1388, 1389-1390 (7th Cir. 1970); *Rowe* v. *United States Fidelity & Guaranty Co.*, 421 F.2d 937, 940-942 (4th Cir. 1970); *Steedly* v. *London & Lancashire Ins. Co.*, 416 F.2d 259, 262-263 (6th Cir. 1969); *Liberty Mut. Ins. Co.* v. *Davis*, 412 F.2d 475, 484-485 (5th Cir. 1969).

Congress has broad power under the Property Clause of the Constitution, Art. IV, § 3, Cl. 2, to dispose of such a property right of the United States by assignment. For Article III purposes, however, the crucial point is not whether Congress conceived of the *qui tam* provisions as "assignments" when it passed or amended the FCA, or whether those provisions conform precisely to the rules that generally govern the assignability of choses in action. Rather, cases involving the assignment of claims demonstrate that federal courts can and do validly adjudicate suits in which a plaintiff has not been individually injured by a defendant's primary conduct, but has nevertheless acquired an adequate concrete stake in the litigation through a transfer of rights from a person who *has* suffered injury. See *Defenders of Wildlife*, 504 U.S. at 572-573 (distinguishing the standing ruling in that case from one "in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit, by providing a cash bounty for the victorious plaintiff").

b. *Qui tam* relators are not "Officers of the United States," and their selection is not governed by the Appointments Clause. Congress has not "established by Law" a government "Office" of FCA informer or relator. To the contrary, the Act's *qui tam* provision is entitled "ACTIONS BY PRIVATE PERSONS." 31 U.S.C. 3730(b). Insofar as the Appointments Clause is concerned, the relator is more aptly analogized to a plaintiff who invokes a private right of action under a federal statute. Congress's decision to create a private right of action may often rest in part on its belief that such provisions will vindicate a societal interest in deterring and remedying violations of federal law by enlisting private individuals in the process by which the law is

enforced. The fact that a private lawsuit assists in the effectuation of federal policy does not transform the plaintiff into an "Officer of the United States" whose selection is governed by the Appointments Clause.

c. For much the same reasons, the *qui tam* provisions of the FCA do not violate separation of powers principles. This Court "has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). The Executive Branch's exercise of prosecutorial discretion is presumptively unreviewable, however, only in the sense that executive officials generally cannot be compelled by a court to pursue an enforcement action that they believe to be unwarranted. Federal law frequently permits a private party to file a civil action even when governmental officials believe that no violation has occurred, see, *e.g.*, 42 U.S.C. 2000e-5(f)(1) (private plaintiff may file Title VII action if charge of unlawful employment discrimination is dismissed by the Equal Employment Opportunity Commission), and such provisions raise no separation of powers concerns.[12]

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[12] If the government elects to intervene in a *qui tam* action, see 31 U.S.C. 3730(b)(2)-(4), "it shall have the primary responsibility for prosecuting the action," 31 U.S.C. 3730(c)(1), but the relator retains the right to continue as a party, see *ibid*. In the instant case, the government declined to intervene to take over the litigation. See Pet. App. 4a. This case would therefore be an inappropriate vehicle for the resolution of any constitutional issues that might be raised by the relator's continued participation in a suit in which the government did intervene. In our view, however, the Act, if properly applied, affords sufficient protection of Executive Branch authority to satisfy any constitutional concerns. See 31 U.S.C. 3730(b) and (c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

The False Claims Act, 31 U.S.C. 3730, provides as follows:

§ 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by

affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall

have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to

an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such ex-

penses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional,

administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any

special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

Supreme Court, U.S.
FILED
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No. 95-1340

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

HUGHES AIRCRAFT COMPANY

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER

Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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IN THE
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HUGHES AIRCRAFT COMPANY

Petitioner,

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UNITED STATES EX REL. WILLIAM J. SCHUMER

Respondent.

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

Pursuant to Supreme Court Rule 37.2, *amici curiae* Chamber of Commerce of the United States of America and Aerospace Industries Association of America, Inc. urge the Court to grant Hughes Aircraft Company's ("Hughes") petition for a writ of certiorari filed in this case. This brief is filed with the consent of both Petitioner and Respondent

INTERESTS OF THE AMICI CURIAE

The **Chamber of Commerce of the United States of America** ("the Chamber") is the nation's largest federation of business organizations and individuals, representing more than 220,000 companies, many of which provide goods and services to the United States under government contracts. The Chamber also represents several thousand trade and professional associations, and state and local chambers of

commerce. Ninety-three percent of the Chamber's members are businesses with fewer than 100 employees, and seventy-one percent have fewer than ten employees.

As the principal voice of the American business community, the Chamber regularly represents the interests of its members in court on issues of national concern. As in this case, the Chamber seeks to ensure that federal laws affecting the business community are interpreted and applied fairly and consistently throughout the nation's lower courts.

The **Aerospace Industries Association of America, Inc.** ("AIA") is a national, non-profit trade association representing manufacturers of commercial, military and business aircraft, helicopters, aircraft engines, missiles, spacecraft, and related components and equipment. AIA is comprised of forty-nine member companies, including many of the nation's largest corporations. Virtually all of AIA's members provide goods and services under contracts with the federal government, many deriving a significant portion of their business from such contracts.

Many of *amici's* members who perform government contracts have been affected by the False Claims Act ("FCA") Amendments of 1986 ("1986 Amendments"), Pub. L. No. 99-562, 100 Stat. 3153, 31 U.S.C. §§ 3729, *et seq*. The 1986 Amendments stimulated a substantial increase in the number of *qui tam* actions brought by individuals (or "relators"), who are empowered to bring actions on behalf of the government against government contractors who submit false claims to the government. Since 1986, AIA members have been named in over sixty FCA actions, including more than thirty *qui tam* actions.

While the FCA allows the government to investigate the relator's allegations and to intervene in the action (31 U.S.C. § 3730(b)(2)), in the vast majority of cases, the government

has declined to intervene.1/ When the government declines to intervene, the relator's action has been subject to a jurisdictional limitation. Prior to the 1986 Amendments, the relator's action was barred if it was based on information already known to the government. 31 U.S.C. § 3730(b)(4) (1985). Under the 1986 Amendments, the government's prior knowledge no longer bars the relator's action. Rather, the action is barred if it is based upon the "public disclosure" of allegations or transactions in a criminal or civil action, administrative hearing, report, audit or investigation, or in the news media, unless the relator is an "original source" of the information. 31 U.S.C. § 3730(e)(4)(A).

Hughes' petition raises two questions, on which the circuits are split, concerning relators' rights to maintain *qui tam* actions after the government declines intervention: (1) whether the FCA's amended jurisdiction provision applies retroactively to pre-amendment conduct, and (2) whether the amendment bars a *qui tam* action that is based upon a government audit report which is disclosed by the government to the contractor's employees and which is available to the public under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

These questions are of critical importance to members of the Chamber and AIA. The numerous cases declined by the government but pursued by relators have exposed the Chamber's and AIA's members to substantial potential

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1/ From FY 1987 through FY 1995, 1,105 qui tam actions were filed. The government intervened in only 189 cases, and declined intervention in 672 cases. Department of Justice *Qui Tam* Statistics, printed in 64 Fed. Contracts Rpt. 348-49, 362 (BNA Oct. 23, 1995). Presumably, the other 244 *qui tam* actions were still under seal as of October 1995.

liability. Many of these cases turn on the retroactivity issue and the definition of "public disclosure."[2/]

In the case at issue, the Ninth Circuit held that the government's disclosure of an audit report to a contractor is not a "public disclosure" serving to bar a *qui tam* action based on the audit report. This decision is particularly troublesome to the Chamber and AIA. Their contractor members are routinely audited by the government, and the audit reports are frequently disclosed to the contractors and circulated among their employees. The decision permits an employee to maintain a *qui tam* action even though he has no knowledge of wrongdoing except that which he learned from the government audit. The decision threatens an escalation of such "parasitic" *qui tam* actions in the Ninth Circuit.

Cases pursued solely by *qui tam* relators have imposed substantial direct costs and other burdens on member contractors, including interference with performance of the contracts at issue, payment of costs and attorneys' fees, and negative publicity attendant to being sued in the name of the United States. At the same time, these non-government cases have produced minimal, if any, financial recovery for the United States.[3/] *Amici* believe that the generally

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2/ Since a *qui tam* action may be filed in any judicial district in which the defendant "can be found, resides, transacts business, or in which any act proscribed by [the FCA] occurred" (31 U.S.C. § 3732(a)), many of the Chamber's and AIA's members who transact business in multiple locations will be adversely affected by relators forum shopping as a result of the circuits' split.

3/ Recoveries have occurred in only 31 cases in which the government declined intervention. This represents less than 5% of the 672 cases where the government chose not to intervene; the $15.6 million recovered in these 31 cases is less than 1% of the government's total recoveries under the FCA since FY 1987. *See, supra, n.1.* Contractors have incurred far more costs in

(Footnote cont'd on next page)

counterproductive consequences of *qui tam* litigation stem from the constitutional defects in the FCA noted in Hughes' petition -- the encroachment on the Executive Branch's prosecutorial discretion by a private, self-appointed party acting under the guise of governmental authority who has no personal injury-in-fact.[4/]

Resolution of these issues concerning relators' rights to maintain *qui tam* actions will directly and substantially affect other *qui tam* actions currently pending against *amici's* members, as well as future actions. For these reasons, the petition for certiorari should be granted.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD RESOLVE THE SPLIT OVER RETROACTIVE APPLICATION OF THE FCA'S JURISDICTION PROVISION.

This Court's decision in *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1501 (1994), affirmed that a statute is presumed to operate only prospectively absent clear Congressional intent to the contrary. Nevertheless, *Landgraf's* retroactivity principles have left the lower courts struggling with the temporal reach of many federal statutes. Applying *Landgraf's* retroactivity analysis has proved

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successfully defending such actions, and those costs, in many cases, are later passed on to the government through reimbursement of allowable overhead expenses as provided for in the Federal Acquisition Regulations (48 C.F.R. § 31.205-47).

4/ The Chamber and AIA endorse Hughes' position that the *qui tam* provisions of the FCA are unconstitutional and request that the Court address that issue. The principal focus of this brief, however, are the aforementioned questions of statutory application and interpretation.

particularly difficult in cases, like this one, involving jurisdictional statutes.

Here, the Ninth Circuit incorrectly held that there is a "strong presumption that jurisdictional statutes apply retrospectively." 63 F.3d at 1517. The court applied the FCA's amended jurisdictional bar retrospectively, holding that doing so did not infringe on Hughes' substantive rights. *Id.* In direct contrast, as discussed in Hughes' petition, the Sixth Circuit held in *United States v. TRW, Inc.*, 4 F.3d 417, 422 (6th Cir. 1993), *cert denied*, 114 S. Ct. 1370 (1994), that the amendment could not be applied retroactively because it expanded the circumstances under which *qui tam* actions could be brought.

This Court should grant the petition to resolve this conflict and to provide the lower courts with much needed guidance, clarifying that jurisdictional provisions that change the legal consequences of past conduct may not be applied retroactively absent congressional intent, and that statutory application is governed by the conduct that will be affected by the new law, not the date on which the action was filed.

A. The Retroactivity Question Has Precedential Value To Other Pending FCA Cases.

A decision by this Court on whether the amended jurisdiction provision applies retroactively to pre-amendment conduct will control several pending *qui tam* actions in which the government declined intervention. These actions are barred under the pre-1986 FCA because of the government's prior knowledge of the allegations, but are not barred under the 1986 Amendment because the allegations had not been publicly disclosed prior to the filing of the action.

In *Hyatt v. Northrop Corp.*, Nos. 94-55638, 94-55578, 1996 U.S. App. LEXIS 7464 (9th Cir. April 11, 1996), the government acquired the information upon which the action was based, and the relator filed the complaint, before the 1986 Amendments were enacted. After declining intervention, the government filed an *amicus curiae* brief

recommending dismissal under the pre-1986 provision. On appeal from the district court's dismissal, the Ninth Circuit reversed, stating that its decision in the instant case compelled retroactive application of the 1986 jurisdiction provision.

In *Boisvert v. FMC Corp.*, No. C-86-20613, 1987 U.S. Dist. LEXIS 13549 (N.D. Cal. Sept. 8, 1987), another action filed prior to the 1986 Amendment, the district court held that by permitting an action that previously would have been barred, the amendment impaired FMC's substantive rights. The court therefore held that the pre-1986 government knowledge jurisdictional standard applied, resulting in 20 of the 32 claims being dismissed. The decisions here and in *Hyatt* could spawn attempts to resurrect those claims.

In *United States ex rel. Newsham v. Lockheed Missiles and Space Company, Inc.*, 907 F. Supp. 1349 (N.D. Cal. 1995), the relator disclosed to the government in 1984 allegations of false charging of labor hours, but waited until 1988 to file her action. Lockheed moved under the pre-1986 jurisdiction provision for dismissal of the allegations that were previously known to the government. The district court denied Lockheed's motion, and the Ninth Circuit denied Lockheed's petition for a writ of mandamus. The case is pending in district court.

In *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 700 (1996), the relator disclosed his allegations to the government in 1988, more than a year before filing his suit. Because the defendant's challenged conduct occurred before 1986, the district court held that the pre-1986 FCA applied and dismissed the action upon concluding that the government had knowledge of the allegations one year prior to the filing of the action. The Ninth Circuit reversed, holding that the 1986 Amendment applied because the government did not obtain its knowledge until after the 1986 Amendments were enacted. The case is pending.

As these cases demonstrate, there is a pressing need to resolve the question of retroactive application with respect to jurisdictional limitations on *qui tam* actions.

B. Circuits Are Split On The Proper Application Of Landgraf's Retroactivity Principles.

The petition is an ideal vehicle for further elaboration of *Landgraf's* retroactivity principles. As the following cases demonstrate, the appellate courts are divided over whether jurisdictional and procedural rules that change the legal consequences of past conduct may be applied retroactively absent such direction by Congress.

1. Circuits Are Split On The Legal Consequences Of Past Conduct.

In *Chenault v. U.S. Postal Service*, 37 F.3d 535, 539 (9th Cir. 1994), the Ninth Circuit correctly noted that, "[r]egardless of whether a statute is 'substantive' or 'procedural,' it may not apply to cases pending at the time of enactment if the new statute would prejudice the rights of one of the parties." *Id.* Because the extension of the time for filing discrimination claims against the government would have increased the defendant's liability by forcing it "to defend against an action that was previously time-barred," the court held that § 114 of the Civil Rights Act of 1991 may not be retroactively applied in that case. *Id.* The Tenth Circuit has reached the same conclusion.5/

In *Maitland v. University of Minnesota*, 43 F.3d 357 (8th Cir. 1994), the Eighth Circuit held that § 108 of the Civil Rights Act of 1991 could not be applied retroactively to bar

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5/ *Million v. Frank*, 47 F.3d 385, 389-90 (10th Cir. 1995) (no retroactive application where defendant would have been "force[d] to defend an action previously time-barred").

the plaintiff's claims.6/ Pursuant to § 108, a person who is given notice of, and an opportunity to participate in, proceedings leading to judicial approval of a settlement of an employment discrimination claim may not challenge the employment practices that are within the scope of the approved settlement. At the time Maitland participated in the consent decree hearings, his participation in the proceedings would not have barred his cause of action for employment discrimination. The Eighth Circuit correctly refused to apply § 108 because to do so retroactively would impair rights a party had when he/she acted and attach new legal consequences to events completed before its enactment. *Id.* at 362-363 (citing *Landgraf*).

Therefore, the Eighth and Tenth Circuits, as well at least one panel of the Ninth Circuit, have found that, pursuant to *Landgraf*, statutes that extinguish a cause of action that was viable under prior law or revive a previously barred claim have impermissible "retroactive effect." Those courts recognize that statutes -- even if they are jurisdictional or procedural in nature -- may not be applied retroactively if they change the legal consequences of past conduct.

In contrast, the D.C. Circuit and other panels of the Ninth Circuit have eviscerated the traditional presumption against retroactive application of statutes. As evident from the cases discussed below, *Landgraf's* general statements that (1) jurisdictional provisions "usually 'take away no substantive right'" and (2) "[p]resent law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties," 114 S. Ct. at 1502 (emphasis added), have been misinterpreted by some courts. Despite *Landgraf's* statement

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6/ *Accord, Rafferty v. City of Youngstown*, 54 F.3d 27, 281 n.2 (6th Cir. 1995) ("we agree with the court in *Maitland* . . . that section 108 is not to be applied retroactively.")

that it "do[es] not restrict the presumption against statutory retroactivity to cases involving 'vested rights,'" 114 S. Ct. at 1502 n.29, those courts have incorrectly drawn an artificial line between substantive and procedural rules in determining retroactivity.

In *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3518 (U.S. Mar. 26, 1996) (No. 95-1167) (denying relator's *cert.* petition appealing from adverse judgment on the merits), for example, the Ninth Circuit departed from *Chenault* and permitted the 1986 Amendments to revive previously barred claims. The court stated that the government's prior knowledge of the alleged false claims was "simply a jurisdictional defense" to an FCA action. 61 F.3d at 1408. Hence, because it did not alter the defendant's underlying liability for alleged commission of fraud, the court held that the amended jurisdictional provision was properly applied retroactively. *Id.* Subsequently, in *Schumer*, the Ninth Circuit held that "[b]ecause the amendment does not infringe on the substantive rights of the defendant, it does not rebut the presumption of retrospective application of jurisdictional provisions." 63 F.3d at 1517.

In *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 923 (1995), the court stated, in *dicta*, that the Foreign Sovereign Immunity Act of 1976, which codified the "restrictive" theory of sovereign immunity that took hold in 1952, applies to pre-1952 events. The court stated that, under *Landgraf*, the FSIA does not have "genuine[] retroactive effect." 26 F.3d at 1170. The court concluded that the jurisdictional provision does not affect substantive rights and thus may be applied retroactively. The court failed to recognize that the expectation of immunity that prevailed prior to 1952 amounts to an antecedent right, thus distinguishing *Princz* from the jurisdictional cases cited in *Landgraf*, which merely affected the power of the courts or the propriety of injunctive relief, not the past rights or obligations of the parties.

2. Circuits Are Split On The Legal Consequences Of When The Claim Is Filed.

Some lower courts have also improperly focused on the date the suit was filed as opposed to the impact the statute has on pre-enactment conduct. In *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 988 (10th Cir. 1996), the court held that the damages provision in the Civil Rights Act of 1991 could not be applied retroactively because the action was filed before the effective date of the Act. The ruling implied that the presumption against the retroactive application is restricted to cases filed before the effective date of a statute. *See also, Craig v. O'Leary*, 870 F. Supp. 1007, 1010 (D. Colo. 1994) (where action is filed *after* the date of the Civil Rights Act of 1991, "the remedies permitted under the 1991 Act apply regardless of when the conduct giving rise to them occurred"). In contrast, in *Theard v. Glaxo, Inc.*, 47 F.3d 676 (4th Cir. 1995), the court held that section 101 of the Civil Rights Act of 1991 "does not apply to cases in which the conduct occurred before [enactment], regardless of when the claim was filed."

In sum, the *Landgraf* test has been applied inconsistently, often erroneously. The circuits disagree over whether statutory provisions that affect the rights and obligations of the parties, although couched in jurisdictional terms, may be retroactively applied. Circuits also disagree over the more basic question of whether the time of filing a suit is relevant to the retroactivity analysis.

The retroactivity holding below is contrary not only to the Sixth Circuit's decision in *United States v. TRW, Inc.*, but to other circuits' application of *Landgraf*. To foster fair, uniform application of the FCA and other federal statutes, this Court should provide needed guidance on the retroactivity principles in *Landgraf*.

II. COURTS ARE DIVIDED OVER THE MEANING OF THE FCA'S AMENDED JURISDICTIONAL BAR.

As discussed in Hughes' petition, the Circuits are divided on the meaning of the term "public disclosure" as used in the amended jurisdictional bar. Hughes argued below that a government audit report, containing allegations of wrongdoing by the contractor, that is disclosed by the government to employees of the contractor who were unaware of the alleged wrongdoing, constitutes a "public disclosure." That principle is squarely supported by a decision of the Second Circuit, *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992). However, the Ninth Circuit disagreed with Hughes' characterization, creating a split which, if left unresolved, will open the door to *qui tam* actions in the Ninth Circuit that would be barred elsewhere.

In addition, other circuits have held that a government document that is "available" or "potentially accessible" to the public is considered to be publicly disclosed under the FCA even if no one has actually sought to obtain the document.[7/] Hughes asserts that since a government audit report is accessible to members of the public under the Freedom of Information Act, the jurisdictional bar should be applied whenever the government has prepared an audit report. In contrast to the other circuits' broad interpretation, the Ninth Circuit held here that a government audit report cannot be considered a "public disclosure" until it is actually obtained by a member of the public. 63 F.3d at 1520.

7/ *United States ex rel. Kreindler et al. v. United Technologies Corp.*, 985 F.2d 1148, 1158 (2d Cir.), *cert. denied*, 113 S. Ct. 2962 (1993); *United States ex rel. Stinson, et al. v. Prudential Ins. Co.*, 944 F.2d 1149, 1159 (3d Cir. 1991); *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1312 (1991).

The Ninth Circuit misconstrued the purpose of the jurisdictional bar and Congress' reasons for amending the provision, as well as the statute's plain language which does not preclude contractor employees from being considered members of the public.

A. Congress Intended To Bar *Qui Tam* Actions When The Government Has Already Commenced Visible Enforcement Efforts.

The pre-1986 bar against *qui tam* actions that were "based upon evidence or information the Government had when the action was brought" (31 U.S.C. § 3730(b)(4) (1985)) afforded nearly complete deference to the exercise of the government's enforcement discretion. In 1986, Congress expressed dissatisfaction with cases in which the government possessed information supporting a FCA case but appeared to have taken no action upon it. As a result, Congress intended less deference to government enforcement by barring *qui tam* actions only when the government already has decided to bring suit or pursue an administrative remedy, or has decided not to bring any action, provided the subject allegations have been publicly disclosed. The amendment was not intended to promote parasitic suits, but rather to permit citizen enforcement when the government has taken no visible enforcement measures.[8/]

The Ninth Circuit misinterpreted this purpose. In addressing the Second Circuit's holding in *Doe*, which held that any disclosure of allegations by the government to members of the public with no prior knowledge thereof,

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8/ "The Committee recognizes the validity of the reasons for enactment of the [jurisdictional bar]. Nevertheless, the Committee is concerned that there are instances in which the Government knew of the information that was the basis of the qui tam suit, but in which the Government took no action." H.R. Rep. No. 660, 99th Cong., 2d Sess. 22-23 (1986) (statement of Rep. Berman).

including employees of the defendant company, constitutes a public disclosure, the Ninth Circuit stated:

> Contrary to Congress' intentions for the jurisdictional bar, the *Doe* rule "effectively shifts the standard from 'public disclosure' back to 'government investigation,'" so that government possession of information relating to fraud effectively forecloses *qui tam* suits.

63 *F.3d at* 1519 (*citing the dissent in Doe*, 960 F.2d at 326). The Ninth Circuit thus overlooked the fact that Congress was concerned primarily with the situation in which the government possessed information but did nothing, *i.e.*, conducted no investigation and took no enforcement steps whatsoever.[9/] The pre-1986 law permitted that situation because the standard was mere "government knowledge," not government "investigation," as the Ninth Circuit incorrectly stated. The legislative history suggests that if the pre-1986 law had ensured that the government actually conduct an investigation before a *qui tam* action could be barred, Congress would have been satisfied.

The instant case is hardly one of government inaction, much less government inaction in secret. Here, before the relator did anything, the government had already engaged in extensive enforcement efforts by conducting an administrative audit and temporarily withholding $15.4 million in payments to Hughes. The government's enforcement efforts were clearly disseminated and known

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9/ "We must prevent suits from being dismissed simply by the Government's assertion that the Government already had the information brought forward by the plaintiff in order to ensure that the Government is indeed acting on that information." *False Claims Act Amendments, 1986: Hearings Before the Subcomm. on Admin. Law and Government Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 95 (statement of Rep. Berman).

outside the government, not only to employees of Hughes, but also to its prime contractor, Northrop Corporation, which had no part in the alleged wrongdoing. Because of the government's action in actually exercising its enforcement discretion, and the visibility of that action outside the government, this is precisely the kind of case Congress left to the prosecutorial discretion of the government to the exclusion of *qui tam* enforcement.

B. The Ninth Circuit's Decision Invites "Parasitic" Actions That Congress Sought To Bar.

In amending the FCA in 1986, Congress sought to encourage actions by whistleblowers "who bring . . . wrongdoing to light." But Congress also wanted to limit "parasitic" suits by opportunistic plaintiffs whose actions contribute nothing to enforcement efforts already taken by the government.[10/] The Ninth Circuit lost sight of this second purpose. Hughes asserted below that to allow a *qui tam* action based on a government audit that was distributed throughout a company would result in a *qui tam* action whenever an audit contains adverse findings. The court did not weigh that concern appropriately or realistically.

First, the court feared that application of the jurisdictional bar in this case would "drastically curtai[l] the ability of insiders to bring suit once the government becomes involved in the matter." 63 F.3d at 1519. Yet that is precisely the purpose of the jurisdictional bar -- to bar private enforcement efforts that come after the government has commenced its own actual enforcement effort.[11/] *Wang ex*

10/ S.Rep. No. 345, 99th Cong., 2d Sess. 14, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5279 (hereafter "Senate Report").

11/ The history of Congress' and courts' efforts to deal with parasitic *qui tam* actions is described in *United States ex rel. Stinson, et al. v. Prudential Ins. Co.*, 944 F.2d at 1162-68.

rel. United States v. FMC Corp., 975 F.2d 1412, 1419 (9th Cir. 1992) ("A 'whistleblower' sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a 'conspiracy of silence,' not their mimics."). A *qui tam* relator who merely mimics the government's own findings not only adds nothing to the government's enforcement efforts, he may interfere with those efforts and, because he is entitled to share in the government's recovery, reduce the amount received by the Treasury.

The Ninth Circuit was unmoved by the threat of a dramatic increase in *qui tam* actions copied from government audit reports, since "any such effect would be limited to a single lawsuit in each instance." 63 F.3d at 1519. This is little comfort, however, in view of the thousands of audits released annually. Congress could not have intended the result which the Ninth Circuit finds untroubling -- that anyone who sees an audit report can use it as the basis for a *qui tam* action, as long as he or she is the first one to do so.

C. The Ninth Circuit's Definition Of "Public Disclosure" Conflicts With The FCA's Language.

1. A Government Audit Report Is One Of The Express Means By Which A Public Disclosure Occurs.

The jurisdictional bar specifically identifies a government audit as one of the documents or contexts in which allegations can be publicly disclosed. DoD's Defense Contract Audit Agency ("DCAA") "routinely provides copies of draft reports for all audits . . . to the contractor being audited for review and comment." DCAA Audit Manual § 10-212.2 (1996). Congress must have been aware of such routine disclosures when it included audit reports as

one of the express examples of how a "public disclosure" occurs.12/

In addition to the government's affirmative release, audit reports are also routinely available to other members of the public through the FOIA. The DCAA's FOIA regulations state: "It is the policy of DCAA to: (a) Promote public trust by making the maximum amount of information available to the public, upon request, pertaining to the operation and activities of the Agency." 32 C.F.R. § 290.4. The regulations also describe the procedures for requesting and obtaining audit reports. *Id.* at § 290.7. Congress must have known also of the FOIA presumption in favor of public disclosure of audit reports.

The decisions noted in Hughes' petition that have broadly interpreted the FCA's jurisdictional bar as barring actions based on information that is "available" or "accessible" to the public support Hughes' assertion that audit reports available under FOIA may not be the basis of a *qui tam* action, in contrast to the Ninth Circuit's holding in the instant case that an audit is publicly disclosed under FOIA only when it is actually requested and released. 63 F.3d at 1520. This court should resolve that issue consistent with Congress' desire to limit *qui tam* actions when the government has taken action through the process of conducting and making publicly available an administrative audit.

12/ While the Audit Manual in effect in 1986 does not state that such disclosures are "routine," it notes that disclosure is subject to the contracting officer's approval. § 10-213.3 (1983).

2. Contractor Employees Are Not Exempt From Being Considered Members Of The Public.

The Ninth Circuit interpreted the term "public disclosure" so as to exclude contractor employees as members of the public. 63 F.3d at 1518-19. This exclusion is nowhere found in the statute; it conflicts with decisions of other circuits, as noted in Hughes' petition, and it rests on the fallacy that defense contractor employees are uniquely inclined to suppress fraud.

In *Doe*, the Second Circuit held that public disclosure occurred when federal investigators arrived at the defendant's offices with a search warrant and informed employees they were investigating allegations of fraudulent overcharging under defense contracts. 960 F.2d at 319-20. *Doe* held that "[o]nce allegations of fraud are revealed to members of the public with no prior knowledge thereof, the government can no longer throw a cloak of secrecy around the allegations," *i.e.*, a public disclosure has occurred. *Id.* at 323.

The Ninth Circuit ruled that accepting a contractor's employees as members of the public was "unrealistic" because: (a) employees are inclined to protect the information from outsiders, thereby limiting "the potential for corrective action presented by other forms of disclosure;" and (b) the government and its contractors "operate within a closed loop of secrecy" such that information disclosed between them stays "within a private sphere." 63 F.3d at 1518. These generalities find no support in the statute, however.

The FCA does not expressly or impliedly exempt contractor employees from status as members of the public. Indeed, the opposite conclusion fits the scheme of the legislation. Congress, focusing primarily on defense procurement fraud, expressly identified an audit as one vehicle of public disclosure, knowing that audits are routinely disclosed by the government to the audited contractor (and perhaps to its prime contractor, as was done here). The effect of the Ninth Circuit's analysis is to create

an implied exception for the most common way that government audits are released outside the government. The lower court's speculation about the behavior of contractor employees is insufficient to justify this departure from a plain reading of the FCA, a reading that is consistent with the realities of government audit disclosure.

In any event, the panel's assumptions about contractor employees being part of a "closed loop of secrecy" are unfounded. There is nothing peculiar about government contracting that fosters keeping illegal conduct secret. Since Congress must have presumed that most *qui tam* actions would be filed by contractors' employees,[13/] the panel's apparent disregard of their role is especially misplaced. Had Congress shared the court's view, it would have enacted a vastly different statute.

The court's fear that the Second Circuit's interpretation of "public disclosure" would allow a conspiracy of silence is therefore misplaced. *Doe*'s holding that the disclosure was "public" because it was made to "innocent employees" who were "strangers to the fraud" implements the core rationale of the *qui tam* provisions, whereas the Ninth Circuit ultimately second-guesses and overrides that rationale.

Here, the record describes a lengthy audit process involving scores of people from Hughes, Northrop and the government. The "closed loop of secrecy" that the panel feared simply did not and could not have existed; therefore, neither did the need, or statutory justification, for a *qui tam* action.

13/ Senate Report, p. 5269-70. Of the 33 reported *qui tam* cases within the Ninth Circuit, 24 were filed by employees of the defendant. The Ninth Circuit even noted that such cases are the "paradigm *qui tam* case." *United States ex rel. Fine v. Chevron*, 72 F.3d 740, 742 (9th Cir. 1995) (*en banc*).

CONCLUSION

For the foregoing reasons, the Chamber and AIA urge the Court to grant Hughes' petition for certiorari.

April 22, 1996 Respectfully submitted,

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No. 95-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HUGHES AIRCRAFT COMPANY,
Petitioner,

v.

UNITED STATES *ex rel.* SCHUMER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR ELECTRONIC INDUSTRIES ASSOCIATION, NATIONAL SECURITY INDUSTRIAL ASSOCIATION, AND SHIPBUILDERS COUNCIL OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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BRIEF FOR ELECTRONIC INDUSTRIES ASSOCIATION, NATIONAL SECURITY INDUSTRIAL ASSOCIATION, AND SHIPBUILDERS COUNCIL OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

The Electronic Industries Association is a national organization of more than 1200 companies involved in the development and production of televisions, radios, computers, telecommunications devices, radars, avionics, and other military and commercial electronic equipment. The National Security Industrial Association is a national organization of more than 300 manufacturing, research, and service companies from all segments of industry that provide

goods and services in support of the national security needs of the United States. The Shipbuilders Council of America is a voluntary, nonprofit trade association founded in 1920 to promote a sound private shipbuilding and ship-repair industry in the United States; to promote an adequate mobilization potential of privately owned shipbuilding, ship repair, and allied industry for availability during national emergencies; and to afford a means of cooperation between government and industry on matters of national concern. Amici's members annually perform billions of dollars of work for government agencies pursuant to thousands of contracts.

Because much of their work involves government contracts, amici's members are exposed to the possibility of suits initiated by private individuals pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. §§ 3729-3733. Many of amici's members have already been defendants in such suits, which are frequently meritless. Even when the lawsuit has no merit, however, qui tam litigation is extremely burdensome and imposes public dishonor on a defendant through the accusation, in the name of the United States, that it has committed fraud against the government. The qui tam provisions expose companies to these burdens at the whim of any private citizen acting from the motivation of personal enrichment.

The decision below will increase the burdens already imposed by the statute. Congress intended the qui tam provisions to afford citizens an incentive to come forward with information of fraud that would otherwise not come to light. Disregarding this purpose, the Ninth Circuit ruled that companies can be subjected to qui tam lawsuits brought by their employees even if the employees learn of possible

misconduct from the Government. This decision exposes amici's member companies to the possibility of meritless suits asserted after the Government has investigated the same allegations and determined that a lawsuit is inappropriate. Accordingly, amici have a strong interest in the issues presented in this case, and we believe the Court would benefit from their views. In the interest of brevity, amici address only some of the issues presented in the petition, relying entirely on petitioner's discussion of the other issues.

Both petitioner and respondent have consented to the filing of this brief, and letters reflecting these consents have been lodged with the Clerk of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents several important questions arising out of the 1986 amendments to the False Claims Act. Those amendments have caused an explosion in the volume of qui tam litigation, one that shows no sign of abating. Qui tam filings have risen steadily from 33 in 1987 to 131 in 1993 to 274 in 1995. D.O.J. Release 95-542 (Oct. 18, 1995) (1995 WL 614572). That growth is not caused by an increase in the number of false claims filed with the government; rather, it reflects a growing awareness by citizens, notably lawyers, of the possibility of obtaining a substantial private recovery by suing government contractors in the name of the United States.

This case is representative of the most pernicious feature of this litigation explosion -- the numerous meritless suits in which the government declines to intervene but which nonetheless are pursued to the end by private plaintiffs who are eager to take a chance at hitting the jackpot, or at least wearing down the defendant into agreeing to a nuisance

settlement. Unlike the government, which has a strong institutional interest against pursuing meritless litigation, these plaintiffs are not inclined to abandon their lawsuit merely because the defendant has done nothing wrong.

Then Assistant Attorney General Stuart Gerson detailed some of the abuses of the qui tam provisions in testimony before Congress in 1992. He stated that many qui tam suits are "frivolous," presenting "no evidence, no information based on personal knowledge, or are 'kitchen sink' complaints containing every conceivable broad allegation without any specific evidence whatsoever." False Claims Act Technical Amendments of 1992: Hearing on H.R. 4563 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee of the Judiciary, 102d Cong., 1st Sess. 24 (1992) (statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, Dept. of Justice). Many of these suits were brought by disgruntled former employees attempting to use insubstantial False Claims Act allegations as a way of buttressing a wrongful termination claim that was the true controversy. *See id.* at 28.

The virtues of qui tam suits have been extolled on the ground that they have led to substantial monetary recoveries for the government, but that benefit is rarely found in cases like this one, where the government does not join the litigation. Although the government declines to intervene in most of the cases it investigates, those lawsuits account for only 1.4% of the total recovery in qui tam cases. D.O.J. Release 95-542, *supra*; *see* Hearing on H.R. 4563, *supra*, at 25-26. Despite their lack of merit, such suits place a severe burden on the resources of the judicial system and of innocent defendants because the claims tend to be fact-

intensive ones that a court cannot resolve without giving the plaintiff the opportunity to pursue extensive discovery.

The issues presented in this case are central to whether many of these unjustified lawsuits can be maintained, and it is important that this Court act expeditiously to correct the lower court errors that have contributed to the unfortunate proliferation of such suits.

A. Of particular importance is the scope of the "public disclosure" provision of the Act, which prohibits qui tam suits "based upon the public disclosure of allegations" in the news media or in specified government proceedings unless the suit is brought by an "original source of the information." 31 U.S.C. § 3730(e)(4)(A). The Ninth Circuit held that this qui tam action was not barred even though the government had informed innocent Hughes employees, as well as employees of another company, of the alleged fraud in the course of an administrative audit. But the statutory terms make clear that disclosure of allegations to any member of the public, including contractors' employees, in the course of a government investigation constitutes a "public disclosure." The Court should grant certiorari in order to reject the ill-founded policy-based interpretation of the Ninth Circuit and confirm the Second Circuit's ruling that a qui tam plaintiff may not maintain an action based upon a government investigation that was disclosed to the defendant's innocent employees. *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992).

B. The Court should also grant certiorari to resolve the lingering issue of the retrospective effect of the "public disclosure" provision, which was instituted in the 1986

amendments. The Ninth Circuit incorrectly applied that provision retroactively, even though retroactive application exposes companies to liability in qui tam suits that they could not have contemplated when the conduct in question occurred and eliminates a defense that was available at the time. The Ninth Circuit reached this conclusion by ignoring a decision of a sister circuit and misinterpreting this Court's decision in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). This issue will persist for many years, and a decision by this Court will eliminate much unnecessary future litigation.

C. Finally, the Court can also eliminate future litigation by taking this opportunity to resolve the recurring issue of the constitutionality of the qui tam provisions, which are not sustainable under this Court's precedents concerning separation of powers principles, the Appointments Clause of the Constitution, art. II, § 2, cl. 2, and the requirements for standing imposed by Article III of the Constitution.

ARGUMENT

A. Government Disclosure of Information to "Innocent" Company Employees During an Investigation Constitutes a "Public Disclosure" That Bars an Individual From Asserting a Subsequent Qui Tam Action Based upon That Information.

Under the 1986 amendments to the False Claims Act, a court cannot exercise jurisdiction over a qui tam action that is:

> based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). No provision of the False Claims Act has generated more litigation, comment, and judicial confusion than this "public disclosure" bar, and the courts have adopted widely divergent views on virtually all significant issues that have arisen concerning its interpretation. *See* Pet. 9-10, 11 n.3, 14 n.4, 16-18. Amici urge the Court to curb some of the uncertainties facing government contractors by resolving the issues of interpretation presented in this case.

Hughes argued below that this action should be dismissed because it was based upon information that employees of Hughes and its prime contractor Northrop received from administrative audits conducted by the government. Pet. App. 8a. But the Ninth Circuit held that a government disclosure of allegations of misconduct to employees who were not involved in the alleged misconduct is a "release of information within a private sphere," *id.* at 9a, not a "public disclosure" within the meaning of the statute. *Id.* at 8a-11a. This decision directly conflicts with better-reasoned authority in the Second Circuit, *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322-23 (2d Cir. 1992), *see* Pet. 11-15, and it also diverges from the statutory text and undermines the policies underlying the statute.

It is unreasonable to conclude that a disclosure of allegations of misconduct to members of the public in one of the ways specified in the statute is not a "public disclosure." Nothing in the statute suggests that a disclosure must be broadly disseminated to any particular number of individuals,

or to any particular categories of individuals, in order to be deemed "public." To the contrary, the sorts of "public disclosures" identified in the statute contemplate disparate degrees of dissemination to different groups of individuals. Broadcasts in the "news media" may be disseminated widely to the nation at large; Government Accounting Office reports will likely be read by only a few members of the public; and disclosures in administrative audits and investigations will likely involve only a few specific individuals. Under the statute, however, each of these disclosures ordinarily constitutes a "public" disclosure sufficient to bar a qui tam action based thereupon, regardless of the number or identity of individuals who receive the information.

A principal goal of the 1986 amendments was to provide additional incentives for whistleblowers to bring new information to the government concerning fraud, while continuing to ban "parasitic" lawsuits based upon information already in the public domain. *See Doe*, 960 F.2d at 321-22; *see also* S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266-67; H.R. Rep. No. 660, 99th Cong., 2d Sess. 22-23 (1986). The House and the Senate both initially considered bills that would have permitted relators to institute actions based on publicly disclosed information after a six-month waiting period, but ultimately rejected this possibility. S. Rep. at 30, 1986 U.S.C.C.A.N. at 5295; H.R. Rep. at 3. It would hardly further Congress' purpose to allow qui tam actions based on information already disclosed in the course of a government audit or one of the other methods identified in the statute merely because the information had not been disclosed to a sufficiently broad segment of the public.

The Ninth Circuit's decision rests on its conclusion that the disclosure of information by the government to employees of defense contractors and subcontractors involves "the release of information within a private sphere" rather

than "publicly." Pet. App. 9a-10a. The Ninth Circuit reasoned that it is "unrealistic" to treat employees of government contractors as "members of the public," since these employees would have a "strong economic incentive" to protect disclosures of wrongdoing from further dissemination. Pet. App. 9a.

These conclusions are baseless. Individuals who happen to be employees of defense contractors or subcontractors do not lose their status as members of the public by virtue of their employment. The Ninth Circuit itself is "unrealistic" in surmising that employees of government contractors have no incentive to act upon information relating to fraud. The qui tam plaintiff in this case was a Hughes employee, and as the reported qui tam cases attest, the most common qui tam plaintiffs are current and former employees of corporations. *See, e.g.*, *United States ex rel. Butler v. Hughes*, 71 F.3d 321 (9th Cir. 1995); *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995 (2nd Cir. 1995); *see generally* John T. Boese, *Civil False Claims and Qui Tam Actions* 4-9 through 4-11 (Supp. 1995).

The Ninth Circuit also objects that if a government disclosure to innocent company employees is interpreted as a public disclosure, then "government possession of information relating to fraud effectively forecloses *qui tam* suits." Pet. App. 10a. This is clearly not the case. Only qui tam lawsuits that are "based upon" government disclosures in an investigation or audit are barred by the statute. And even if a qui tam lawsuit is based upon information disclosed by a government audit or investigation, qui tam plaintiffs who qualify as "original sources" of the information will remain able to prosecute their action.

Amici urge the Court to take this opportunity to resolve one of the most significant disputes concerning the

public disclosure provision by repudiating the Ninth Circuit's position and recognizing, like the Second Circuit, that a government disclosure to any member of the public, including an "innocent" employee of a corporation allegedly involved in misconduct or an employee of a different corporation altogether, constitutes a "public disclosure" sufficient to preclude subsequent qui tam actions based upon that disclosure. *Doe*, 960 F.2d at 322-23.

B. The 1986 Amendment Expanding Qui Tam Liability to Suits Based upon Information Possessed by the Government Cannot Be Applied to Events Completed Before its Enactment.

This Court recently affirmed that "prospectivity remains the appropriate default rule" when Congress has not addressed the temporal reach of a statute. *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1501 (1994). The Ninth Circuit disregarded this "default rule" in holding that the amended version of 31 U.S.C. § 3730(e)(4)(A) applies retroactively to pre-1986 conduct. Pet. App. 5a-7a. That decision creates a conflict with another circuit that will make a company's exposure to the burdens of qui tam litigation turn on the happenstance of where it can be sued. This retroactivity issue is recurring and will continue to be important for the next several years, and the issue therefore warrants this Court's attention in conjunction with the other issues presented here.

The Ninth Circuit reasoned that the Court in *Landgraf* created an "exception to [the] rule [of prospectivity] in the case of jurisdictional statutes," and it divined in this Court's opinion a "strong presumption that jurisdictional statutes apply retrospectively." Pet. App. 6a, 7a. Because the public disclosure provision is phrased in jurisdictional terms, the Ninth Circuit then concluded that it must be

"presume[d]" to apply retroactively and that the presumption was not rebutted because the 1986 provision "does not infringe on the substantive rights of the defendant." *Id.* at 7a.

The Ninth Circuit's analysis misreads *Landgraf*, which in fact reemphasizes the "traditional presumption" that, absent an express Congressional directive, statutes do not "operate retroactively." 114 S. Ct. at 1505. The Court defined the prohibited "retroactive effect" as one that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* Thus, *Landgraf* forbids retroactive or retrospective application of a statutory provision in a way that "attaches new legal consequences to events completed before its enactment." *Id.* at 1499.

The Court in *Landgraf* plainly did not contradict the main thrust of its decision by creating a presumption *in favor of* retroactivity for statutory provisions that can be termed jurisdictional. The aspect of the opinion misinterpreted by the Ninth Circuit was the observation that jurisdictional statutes ordinarily do not have a prohibited "retroactive effect" when applied to prior conduct. This is because they "usually 'take away no substantive right but simply change[] the tribunal that is to hear the case'" and "normally . . . 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Id.* at 1502 (citations omitted).

That observation does not support the decision below because the public disclosure bar, regardless of its label, is not analogous to the "usual" or "normal" jurisdictional provision that speaks only to the "power of the court." Prior to 1986, the False Claims Act barred qui tam suits "based upon evidence or information in the possession of the United States." 31 U.S.C. § 3730(b)(4) (1982). In 1986, Congress

replaced that prohibition with a less restrictive one that permits qui tam actions even if the government possessed the underlying information, as long as there has been no public disclosure. *See* 31 U.S.C. § 3730(e)(4)(A).

The effect of the amendment was to strip contractors of a defense that previously barred many qui tam actions -- namely, that the government possessed the underlying information at the time of filing. As a corollary, the amendment also denied contractors the right to be free from qui tam suits after they voluntarily apprised the government of relevant facts concerning possible violations. In this case, for example, Hughes had informed the government by 1984 about the agreements on which plaintiff Schumer bases this qui tam suit. *See* Pet. App. 48a, 56a. Hughes cooperated with an ensuing government investigation into cost allocation under the agreements, and the government ultimately concluded not only that the agreements were legitimate but also that they had saved the government money. *Id.* at 4a. In these circumstances, Hughes was immune from a qui tam suit under the pre-1986 version of the public disclosure provision, and it should not be exposed to qui tam liability just because Schumer did not bring suit until 1989.

The "jurisdictional" label that is attached to the public disclosure provision does not alter the fact that applying the 1986 amendment to prior conduct both "attaches new legal consequences" to that conduct and "increase[s] a party's liability" for it. *See Landgraf*, 114 S. Ct. at 1499, 1505. In another case, the Sixth Circuit correctly found that the pre-1986 jurisdictional bar continues to apply to prior conduct, noting that application of the 1986 amendment to such conduct would impermissibly "affect the substantive rights of both the qui tam and the government plaintiffs" and "expand the circumstances under which citizens may bring false claims suits." *United States v. TRW, Inc.*, 4 F.3d 417, 422 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1370 (1994). This

Court should act to resolve the resulting conflict in the circuits by correcting the Ninth Circuit's misapplication of *Landgraf*. That action not only will harmonize the law concerning an important provision of the False Claims Act, it also will have the salutary effect of preventing the Ninth Circuit from applying its flawed analysis to approve retroactive application of other statutes that have jurisdictional overtones but nonetheless affect the substantive rights of the parties.

C. The Qui Tam Provisions of the False Claims Act Unconstitutionally Encroach on the Authority and Discretion of the Executive Branch.

The qui tam provisions raise serious constitutional problems under the Appointments Clause, the separation of powers principles established by this Court, and Article III. Although no court of appeals has yet disagreed with the Ninth Circuit's decision upholding those provisions, it is nonetheless appropriate for this Court to review that issue at this time. The explosion of qui tam litigation not only has imposed increasing burdens on litigants, it also has yielded a proliferation of difficult issues on which the courts are in disarray. Many of these issues would be mooted if, as we argue below, the qui tam provisions are unconstitutional. It is therefore desirable for the Court to consider the fundamental constitutional issue at its earliest opportunity.

1. It is beyond dispute that the separation of powers among the three branches lies at the heart of "[t]he structure of our Government as conceived by the Framers of our Constitution." *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). At the core of the Executive power is the responsibility to "take care that the Laws be faithfully executed." Art. II, § 3. "Legislative power, as

distinguished from executive power, is the authority to make laws, *but not to enforce them or appoint the agents charged with the duty of such enforcement*. The latter are executive functions." *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) (emphasis added). This irrefutable principle places the conduct of the government's litigation squarely within the Executive's authority. "A lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley v. Valeo*, 424 U.S. 1, 138 (1976).

The qui tam provisions impermissibly divest the Executive of the most fundamental component of law enforcement authority -- the decision whether to initiate a lawsuit in the first place. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Prosecutorial discretion is a critical government function because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id.* at 831. In the False Claims Act setting, for example, the government may decide that other available sanctions are a more appropriate means of resolving a perceived problem than a False Claims Act suit, which might interfere with performance of the contract or cause an unacceptable delay in delivery of critical supplies. Or it may determine that, because of national security or other reasons, the public interest would be disserved by a public trial of the matter.

None of these considerations concern the qui tam relator, whose only interest is to pursue its claim in an effort to collect a bounty. Rather, the balancing of such considerations and the initial decision to sue are the Executive's constitutional responsibility; Congress is not free to delegate to the general public the decision to initiate an enforcement action. Moreover, even in those cases in which the Executive believes litigation is appropriate, the qui tam

provisions improperly constrain its right to direct the litigation on behalf of the United States. If the government intervenes in a case, the qui tam plaintiff remains a party -- free to pursue the litigation in parallel with the Department of Justice in a manner that may be inconsistent with the positions and interests of the Executive.

The qui tam provisions interfere with the Executive's prerogatives to a significantly greater extent than does the independent counsel statute upheld by this Court in *Morrison v. Olson*, 487 U.S. 654 (1988). The Court there concluded that several features of the statute "give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.* at 696. Those features are notably absent from the qui tam provisions of the False Claims Act. In contrast to *Morrison*, the government has *no* control over the commencement of a qui tam suit and no power to circumscribe its jurisdiction or to remove the relator for good cause.

The Ninth Circuit's decision upholding the constitutionality of the qui tam provisions rests in large part on the assertion that the Executive has sufficient control because it "has power, albeit somewhat qualified, to end qui tam litigation." *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 754 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994). But the False Claims Act does not give the Executive Branch any such power. The Act allows the Executive to intervene and seek to dismiss the action, but only after "the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A). Thus, if it wants to dismiss its own claim, just as if it wants to settle (§ 3730(c)(2)(B)), the government is at the mercy of court approval.

As the Ninth Circuit recognized, when the government seeks to dismiss a claim, Congress contemplated an *evidentiary* hearing designed to allow the *court* -- not the Executive -- to determine whether the government has "fully investigated the allegations" or whether dismissal is appropriate in light of the existing evidence. 9 F.3d at 753-54 n.11, quoting S. Rep. No. 345, 99th Cong., 2d Sess. 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291. The Executive's ability to terminate litigation that disserves the interests of the United States therefore is not merely "somewhat qualified"; rather, it is constrained by an unbridled veto power of the trial court that is a significant intrusion into the Executive's constitutional sphere of authority. *See also Gravitt v. General Electric Co.*, 680 F. Supp. 1162, 1164 (S.D. Ohio), *appeal dismissed*, 848 F.2d 190 (6th Cir.), *cert. denied*, 488 U.S. 901 (1988) (court refused to approve Justice Department settlement, noting that the relator's counsel was a "respected . . . member of the bar").

2. By deliberately assigning significant enforcement authority to private citizens, Congress violated not only the basic constitutional separation of powers structure but also the specific injunction of the Appointments Clause, art. II, § 2, cl. 2. In representing the interests of the United States in civil enforcement litigation, the qui tam relator acts as an "Officer of the United States" -- a position that constitutionally can be held only by an Executive Branch appointee. *See Buckley v. Valeo*, 424 U.S. at 140.

3. A qui tam relator lacks standing under Article III of the Constitution to bring an action alleging fraud claims on behalf of the United States, because a relator has suffered no personal "injury in fact" and cannot receive "redress" but only a share of the amount the United States recovers for its injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 15, 1996
CERTIORARI GRANTED OCTOBER 15, 1996

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES *ex rel.*, SCHUMER,

v.

HUGHES AIRCRAFT CO.

CIVIL DOCKET FOR CASE NO. CV 89-0390 MRP (Bx)

Date	No.	PROCEEDINGS
1/23/89	1	COMPLAINT filed. Issued Summons. Case may be referred to Magistrate Brown for discovery.
3/21/89	2	NOTICE OF SERVICE on the United States filed by plaintiff.
4/19/89	3	STIPULATION of relator and the United States for an order lifting seal, extending time of the United States to inform the Court of its election whether to intervene, and staying proceedings filed by the United States.
4/19/89	4	ORDER that the seal placed upon this action by 31 U.S.C. § 3730(b) be lifted as of the date of this order; relator be allowed to serve complaint upon defendant; time within which the United States may complete its

Date	No.	PROCEEDINGS
		investigation of relator's allegations and inform the Court be extended to 7/24/89; all other proceedings in this action be stayed until ten days after the United States has informed the Court of its election.
		* * * *
10/23/89	11	ORDER that the time within which the United States may complete its investigation of the relator's allegations and inform the Court of its election whether to intervene in this action shall be extended to and including 1/23/90, and that all other proceedings in this action shall be stayed until 10 days after the United States has informed the Court of its election.
		* * * *
1/24/90	13	ORDER extending time to 3/27/90 for the United States to complete investigation of relator's allegations and inform the Court of its election; all other proceedings shall be stayed until ten days after the United States has informed the Court of its election.
		* * * *
3/13/90	16	ORDER that the time within which the United States may complete its

Date	No.	PROCEEDINGS
		investigation of the relator's allegations and inform the Court of its election whether to intervene in this action shall be extended to and including 5/30/90 and that all other proceedings in this action shall be stayed until ten days after the United States has informed the Court of its election.
		* * * *
4/3/90	18	FIRST AMENDED COMPLAINT filed by plaintiff William J. Schumer.
5/31/90	19	NOTICE OF ELECTION by the United States declining intervention filed by the United States.
		* * * *
7/23/90	21	NOTICE OF MOTION and motion to dismiss pursuant to Rule 12(b)(1) for unconstitutionality of "Qui Tam" statute, and memorandum of points and authorities, returnable 9/24/90 at 10:00 a.m., filed by defendant.
7/23/90	22	MEMORANDUM of points and authorities in support of defendant's motion to dismiss filed by defendant.
7/27/90	23	OPPOSITION to motion to dismiss filed by plaintiff.

Date	No.	PROCEEDINGS
		* * * *
9/7/90	28	NOTICE OF MOTION and motion for summary judgment in favor of defendant Hughes Aircraft Co. pursuant to FRCP 56(b), returnable 10/29/90 at 10:00 a.m., filed by defendant. . . .
9/7/90	29	MEMORANDUM of points and authorities in support of defendant Hughes Aircraft Co.'s motion for summary judgment pursuant to FRCP filed by defendant.
		* * * *
9/7/90	31	AFFIDAVIT of John F. Wilson filed by defendant.
		* * * *
9/28/90	37	NOTICE OF MOTION and motion for partial summary judgment, returnable 10/29/90 at 10:00 a.m., filed by plaintiff.
10/3/90	38	STIPULATION AND ORDER that for the purpose of defendant's motion for summary judgment, the supplemental affidavit of John F. Wilson may be filed.
		* * * *

Date	No.	PROCEEDINGS
10/15/90	40	OPPOSITION to plaintiff's motion for partial summary judgment filed by defendant.
		* * * *
10/15/90	42	STATEMENT of genuine issues of material fact filed by defendant.
		* * * *
10/15/90	44	OPPOSITION by plaintiff to defendant's motion for summary judgment pursuant to FRCP 56 filed by plaintiff.
		* * * *
10/22/90	46	SUPPLEMENTAL OPPOSITION to defendant's motion for summary judgment filed by plaintiff.
10/22/90	47	REPLY to opposition to plaintiff's motion for partial summary judgment filed by plaintiff.
		* * * *
10/22/90	49	REPLY to plaintiff's opposition to motion for summary judgment filed by defendant.
10/29/90	50	Court denies motion to dismiss, motion for summary judgment, and motion for

Date	No.	PROCEEDINGS
		partial summary judgment; counsel for plaintiff to prepare order. M.O. C/R B Zaccaro.
11/1/90	51	ORDER that the motion to dismiss by defendant is hereby denied; the motion for summary judgment by defendant is hereby denied; the motion for partial summary judgment by plaintiff is denied; the motion to defer consideration of the motion for summary judgment by plaintiff is hereby denied.
11/13/90	52	ANSWER to first amended complaint filed by defendant Hughes Aircraft Co.
		* * * *
1/27/92	99	EXHIBITS in support of motion for summary judgment filed by defendant.
1/27/92	100	EXHIBITS in support of motion for summary judgment filed by defendant.
1/27/92	101	EXHIBITS in support of motion for summary judgment filed by defendant.
1/27/92	102	NOTICE OF MOTION and motion to dismiss for lack of subject matter jurisdiction, returnable 3/9/92 at 10:00 a.m., filed by defendant; order lodged.

Date	No.	PROCEEDINGS
1/27/92	103	MEMORANDUM of points and authorities in support of motion for summary judgment filed by defendant.
1/27/92	104	NOTICE OF MOTION and motion for summary judgment, returnable 3/9/92 at 10:00 a.m., filed by defendant. Proposed statement of uncontroverted facts and conclusions of law lodged. Order lodged.
1/27/92	105	MEMORANDUM of points and authorities in support of motion to dismiss for lack of subject matter jurisdiction filed by defendant
		* * * *
1/27/92	107	EXHIBITS in support of motion for summary judgment filed by defendant.
1/27/92	108	EXHIBITS in support of motion for summary judgment filed by defendant.
1/27/92	109	EXHIBITS in support of motion for summary judgment filed by defendant.
1/27/92	110	NOTICE OF MOTION and motion to amend to include claims, returnable 3/9/92 at 10:00 a.m., filed by plaintiff.
1/27/92	111	NOTICE OF MOTION and motion to return action to jury docket, returnable 3/9/92 at 10:00 a.m., filed by plaintiff.

Date	No.	PROCEEDINGS
		* * * *
2/18/92	113	OPPOSITION to plaintiff's motion to amend complaint to include claims . . . filed by defendant.
		* * * *
2/19/92	115	EXHIBITS in support of separate statement of material facts in opposition to defendant's motion for summary judgment filed by plaintiff.
2/19/92	116	SEPARATE STATEMENT OF MATERIAL FACTS in opposition to defendant's motion for summary judgment filed by plaintiff.
2/19/92	117	MEMORANDUM of points and authorities in opposition to defendant's motion for summary judgment filed by plaintiff.
2/19/92	118	OPPOSITION to motion to dismiss and declaration of William J. Schumer in support thereof filed by plaintiff.
2/19/92	119	NOTICE OF ERRATA respecting opposition to defendant's motion to dismiss filed by plaintiff.
		* * * *

Date	No.	PROCEEDINGS
3/2/92	223	REPLY to Schumer's opposition to motion to dismiss filed by defendant.
3/2/92	224	EVIDENTIARY OBJECTIONS and motion to strike certain evidence submitted in opposition to (1) motion to dismiss and (2) motion for summary judgment filed by defendant.
3/2/92	225	REPLY to plaintiff's opposition to motion for summary judgment filed by defendant.
3/2/92	226	REPLY to plaintiff's opposition to statement of uncontroverted facts and conclusions of law in support of motion for summary judgment filed by defendant
		* * * *
3/2/92	229	EXHIBITS in support of reply to opposition to motion for summary judgment filed by defendant
		* * * *
3/2/92	231	REPLY to opposition to motion to amend complaint to include claims filed by plaintiff
3/9/92	232	OPPOSITION to defendant Hughes Aircraft Co.'s evidentiary objections and motion to strike certain evidence

Date	No.	PROCEEDINGS
		submitted in opposition to Hughes' motion to dismiss and motion for summary judgment, and declarations of Linda R. Maclean and Phillip E. Benson in support thereof, filed by plaintiff.
3/11/92	233	ERRATA to memorandum of points and authorities in opposition to defendant's motion for summary judgment filed by plaintiff.
		* * * *
11/6/91	235	ANSWER to first amended complaint filed by defendant.
		* * * *
4/2/92	238	ORDER that plaintiff's motion to amend complaint to include claims . . . is hereby DENIED, and plaintiff's motion to return action to jury docket is hereby DENIED.
		* * * *
5/20/92	244	FINDINGS of fact and CONCLUSIONS of law. (entered 5/26/92)
		* * * *

Date	No.	PROCEEDINGS
5/20/92	246	ORDER that the motion to dismiss is DENIED. (entered 5/26/92) mailed copy/noticed
5/20/92	247	ORDER that Hughes' motion for summary judgment is GRANTED. (entered 5/26/92) mailed copies/noticed and MD JS-6
		* * * *
6/15/92	250	NOTICE OF APPEAL to the Ninth Circuit Court of Appeals from order filed on 5/20/92 filed by plaintiff. Fees paid. Party service to: Linda Maclean: James Gallagher: Vincent B. Terlep on 6/18/92.
		* * * *
6/26/92	253	CROSS APPEAL to the Ninth Circuit Court of Appeals from order entered on 5/20/92 and order filed on 11/1/90 by defendant. Fees paid. Party service to: Mark R. Troy: Dean Francis Pace: Michael F. Hertz on 7/8/92.
6/23/92	254	AMENDED NOTICE OF APPEAL to the Ninth Circuit Court of Appeals from order filed on 4/2/92 filed by plaintiff. Party service to: Linda Maclean: McKenna & Cuneo: Vincent B. Terlep on 6/7/92. Fees waived.

Date	No.	PROCEEDINGS
		• • • •
8/10/92	264	REPLY to Qui Tam plaintiff Schumer's opposition to motion for award of attorney's fees, declaration of Mark R. Troy.

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

UNITED STATES *ex rel.*, SCHUMER,

Plaintiff-Appellant, Cross-Appellee,

v.

HUGHES AIRCRAFT CO.,

Defendant-Appellee, Cross-Appellant.

CIVIL DOCKET FOR CASE NOS. 92-55759 AND 92-55857

Date	PROCEEDINGS
12/10/92	First BRIEF and 15 copies filed by William J. Schumer in 92-55857, (Informal: no) of 45 pages and 1 excerpts of record; served on 11/27/92 [92-55857, 92-55759] (ft) [92-55759 92-55857]
	• • • •
1/21/93	Second BRIEF and 15 copies filed by Appellee/Cross-Appellant Hughes Aircraft Co., (Informal: no) of 55 pages and 5 excerpts of record; served on 1/19/93. [92-55759, 92-55857] (sw) [92-55759 92-55857]
	• • • •

Date	PROCEEDINGS
3/3/93	Third BRIEF and 15 copies filed by William J. Schumer in 92-55857, (Informal: no) of 49 pages and 5 copies of record; (minor deficiency: need red covers); served on 3/1/93 [92-55759, 92-55857] (sw) [92-55759 92-55857]
	* * * *
3/17/93	REPLY BRIEF and 15 copies filed by Hughes Aircraft Co., (Informal: no) of 25 pages; served on 3/15/93 [92-55759, 92-55857] (sw) [92-55759 92-55857]
	* * * *
8/22/95	OPINION filed: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each party shall bear its own costs. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Dorothy W. NELSON, author; Stephen R. REINHARDT; Melvin BRUNETTI.) Filed and Entered Judgment. [92-55759, 92-55857] (hh) [92-55759 92-55857]
	* * * *
9/12/95	PETITION for rehearing with suggestion for rehearing en banc and 40 copies filed by Appellee Hughes Aircraft Co.; 15 pages; served on 9/12/95 (Panel and All Active

Date	PROCEEDINGS
	Judges) [92-55759, 92-55857] (gva) [92-55759 92-55857]
11/17/95	ORDER filed (Dorothy W. NELSON, Stephen R. REINHARDT, Melvin BRUNETTI): . . . The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED. [92-55759, 92-55857] (hh) [92-55759 92-55857]
11/24/95	MOTION to stay issuance of mandate pending petition for writ of certiorari and declaration of Mark R. Troy filed by Appellee/Cross-Appellant Hughes Aircraft Co.; served on 11/22/95 (to DWN) [92-55759, 92-55857] (hh) [92-55759 92-55857]
11/29/95	ORDER filed (Dorothy W. NELSON, Stephen R. REINHARDT, Melvin BRUNETTI): Hughes Aircraft Company's motion to stay issuance of mandate pending petition to Supreme Court for writ of certiorari is hereby GRANTED. [92-55759, 92-55857] (hh) [92-55759 92-55857]

COST ACCOUNTING STANDARDS BOARD DISCLOSURE STATEMENT *REQUIRED BY PUBLIC LAW 91-379*	COVER SHEET AND CERTIFICATION

Item No.

0.1 Company or Reporting Unit:

Name — RADAR SYSTEMS GROUP

Street Address

City, State and ZIP Code

Division or Subsidiary of (if applicable) — HUGHES AIRCRAFT COMPANY

0.2 Reporting Unit is: (*Check one.*)

A. ☐ Corporate (home) office B. ☒ Group office

C. ☐ Division or subsidiary D. ☐ Other

0.3 Official to Contact Concerning this Statement:

Name and title — PAUL HENDRICKS
MANAGER, GOVERNMENT ACCOUNTING

Phone number (including area code and extension) — (213) 414-7178

0.4 Date of:

This statement — 2 January 1984 (Submitted 3 July 1984)

Most recent prior statement

CERTIFICATION

I certify that to the best of my knowledge and belief this Statement is the complete and accurate disclosure as of the above date by the above-named organization of its cost accounting practices, as required by the Disclosure Regulation of the Cost Accounting Standards Board under 50 U.S.C. App. 2168, Public Law 91-379 (4 CFR 351).

NOT TO BE DISCLOSED

Information contained herein is proprietary to Hughes Aircraft Company, is submitted in confidence, and is protected and exempt from disclosure by the U.S. Government under paragraph (5) of the Freedom of Information Act [illegible phrase].

J.R. ROHLINGER/s/ J.R. Rohlinger

(Name)

GROUP CONTROLLER, RADAR SYSTEMS GROUP

(Title)

THE PENALTY FOR MAKING A FALSE STATEMENT IN THIS DISCLOSURE IS PRESCRIBED IN 18 U.S.C. 1001

• • • •

COST ACCOUNTING STANDARDS BOARD DISCLOSURE STATEMENT REQUIRED BY PUBLIC LAW 91-379	CONTINUATION SHEET Page 8 of 52 Pages Name of Reporting Unit Radar Systems Group

Item No. Item Description

2.5.0 Method of Charging Direct Labor (Con'd)

5. Security on highly classified Special Programs is charged direct when it is program unique, customer directed and/or meets the requirements of Item 3.1.0.

Y. Other

(1) Other direct labor, such as fabrication support, cycle inventories, inventory control, stores support, printed wiring board support, etc., is collected in pool accounts and applied as a direct charge to the product on the basis of basic direct labor charges in the department benefitting from the effort.

The pool accounts are cleared annually and new accounts established.

(2) Direct supervision labor, and effective September 1984 secretaries to direct classified supervision, involved in multiple contract effort, is normally collected in pool accounts and applied as direct charge to government contracts, or similar cost objectives, on the basis

of direct labor charges within the supervisor's organization.

(3) Dispatch labor involved in multiple contract effort is collected in pool accounts and is applied as a direct charge to Government contracts, or similar cost objectives, on the basis of direct labor charges within the benefitting section.

(4) Direct labor cost incurred for engineering design, support and manufacture of common hardware is collected in a holding account and is allocated to contracts based on contemplated requirements.

* * * *

Memorandum UNCLASSIFIED
Northrop Corporation

In reply refer to P600-RJS-84-113
RJS: lm

CLASSIFICATION CHANGED TO
UNCLASSIFIED
AUTHORITY OF 132
BY _____ DATE 10-5-90

To B. George, ACO From: R. J. Soikkeli
15 June 1984

Subject REQUEST FOR GOVERNMENT AUDIT ASSISTANCE - HUGHES AIRCRAFT COMPANY - RADAR SYSTEM GROUP - P.O. BOX 92426-LOS ANGELES, CA. 90009

Copies K. L. Thompson
R. K. Blakeney

1) In accordance with the provisions of DAR 3-807.9(c)(3), Northrop Advanced Systems Division (NASD) requests audit assistance against prime contract F33657-81-C-0067; Subcontract 3MS-290450 AK.

2) A Memorandum of Agreement to establish funding responsibilities to develop an Analog Signal Converter (ASC) and Radar Data Processor (RDP) and costs associated with initial fabrication of EDM hardware between the F-15 Radar Program Office and the AP-10 Radar Program Office at Hughes has been established without our knowledge. The major concerns are:

   a. What is the authority to accumulate cost between a firm fixed price F-15 program and our cost reimbursable program.

   b. What are the costs ramifications for interdependence between a black world cost reimbursable type contract and a white world firm fixed price type contract.

   c. The major concern to us is the agreement by the vendor's programs to share cost without our knowledge and concurrence. The baseline proposal negotiated with Hughes includes total cost for design and development of these units.

   d. Journal voucher of commonality accounts, what is the method used to allocate cost between both programs.

3) The interdepartmental correspondence Memorandum of Agreement are referenced as follows:

   a. Reference: 2172-62483/2
      Dated: 24 June 1983
      Subject: Allocation of Development and Fabrication Tasks for the Analog Signal Converter

   b. Reference: 2172-62483/1
      Dated: 24 June 1983
      Subject: Allocation of Development and Fabrication Tasks for the Advanced Radar Data Processor, Revision A

4) The cognizant DCAA and AFPRO offices are located on site. Copies of the subject Memorandum of Agreement can be obtained from Mr. D. D. Lynch, Jr., Program Manager, Special Programs.

5) Audit findings are requested as soon as possible to determine the cost impact to our negotiated contract and related activities.

6) NASD has been denied access to the subcontractor's account records.

7) If additional data and/or discussion on this request is required, please contact Mr. K. L. Thompson, Price/ Cost Analysis, Ext. 24975 or Mr. R. K. Blakeney Manager, Avionics Subcontracts, Ext. 24175.

/s/ R.J. Soikkeli
R. J. Soikkeli, Manager
Materiel Cost Management
P600/2A - Ext. 24987

Enclosure

2/20/86

RADAR COMMONALITY

PURPOSE

This white paper has been drafted to recap the chronology of events through which the concept of commonality hardware accounts has evolved at 118A.

INTRODUCTION

An internal Memorandum of Agreement (MOA) was developed by 118A to define the common and unique tasks associated with the development of advanced radar systems and set forth funding responsibilities of each program using common items for these radar systems.

BACKGROUND

An advanced Radar Data Processor (RDP) design was conceived by 118A and development of this design was initiated by the F-15 Radar Program Office for the F-15, Mulit-stage Improvement Program (MSIP). During December 1982, when MSIP customer funds were firmly committed and design progress was sufficient to indicate low technical and schedule risks, the Special Programs (SP) (AP-10) Program Office proposed this advanced RDP to their customer for system implementation with no technical, schedule or cost impact attendant thereto. The proposed application was approved by the Special Programs customer in January 1983. 118A then developed an internal commonality MOA which established the development tasks for this RDP, and defined the shared funding responsibilities between the MSIP and SP Program offices. This Memorandum of Agreement was approved by 118A's Senior Management, then unilaterally implemented by 118A with no customer participation. This 118A internal concept of

commonality was subsequently expanded by these two 118A program offices to include internal agreements associated with common design tasks applicable to the development of an Analog Signal Converter (ASC) Unit/ Subunit. This increased interdependency was also implemented without benefit of customer concurrence.

In September 1984, 118A's F-14 Program Office received go ahead for an upgrade of the Radar, based on MSIP technology for the F-14 aircraft. This now presented a more complex commonality issue involving three 118A programs: F-15 MSIP, Special Programs, and F-14D.

COMMON HARDWARE DEFINITIONS (14 December 1982 - 118A MOA)

The baseline concept of commonality was defined in the following context:

1. "Common hardware is defined by drawings/ specifications which establish engineering requirements and design for the fabrication, assembly, inspection and test of items for multi-program usage."
2. The 14 December 1982 Memorandum of Agreement funding responsibilities for the Radar Data Processor are as follows:
   a. The F-15 Program will continue funding *all* development efforts for the 8 common modules.
   b. The Special Programs Program Office would be responsible for funding unique design requirements for their program.
   c. Costs associated with fabrication, assembly and tests of common Engineering Development Model (EDM) modules would be prorated between the using programs and

allocated in direct proportion to the quantity of modules delivered to each program.

   d. Each program is responsible for funding their own unique hardware procurements.
   e. Development, fabrication and/or procurement of the hardware required for the DSIS station for each program, including the HOST and STE Computer and respective peripherals would be funded by capital expenditures approved for each program. The common STE support software would be funded by the F-15 Program Office.

MAY 1984 INDICATED FINAL COST (IFC)

The subject IFC exercise revealed, for the first time, an extraordinary amount of cost growth for those items involved in the 118A Commonality scheme. The Radar Data Processor (RDP) reflected an unauthorized growth of $2 million. The Analog Signal Converter (ASC) was shown to have $4.6 million worth of unauthorized growth. The Radar Signal Processor (RSP) was shown to have unauthorized growth in the amount of $1.2 million and the rationale furnished by the subcontractor was that these items were now in commonality accounts. When requested, no commonality plans were available from 118A's Special Programs Program Office.

DCAA AUDIT ASSIST REQUEST

On 15 June 1984, a request was made through Barbara George, ACO at 190A, for government audit assistance regarding these commonality issues. The letter was generated by Mr. R. J. Soikkeli, Manager, Materiel Cost Management. Mr. Soikkeli's letter outlined our concerns regarding the establishment of the accounts, first of all, and a

lack of visibility or apparent lack of visibility and control by the Special Programs Business Management organization.

The DCAA was unable to provide an in-depth evaluation for analysis regarding the subject.

MOA EXPANSION (February 1985)

In February 1985, the internal Memorandum of Agreement was expanded once again by 118A, to include the F-14D Program and expanded the scope of commonality subjects to be funded by all three program offices. It further revised the previous percentage sharing agreements. The expansion of tasks included such things as development task "phasing." What had previously (in 12 December 1982) been described as "development tasks" were now being described as Initial Development, Phase I, Implement-Upgrade (Phase 2) and Sustaining Engineering Phase (Phase 3), thereby extending the opportunity for funds sharing through this new phasing scheme.

MAY 1985 IFC

The commonality accounts were once again investigated and analyzed, reflecting more unauthorized growth beyond that found in the May 1984 IFC.

The Analog Signal Converter was estimated to have $9.5 million worth of additional growth, for a total of *$14.2 million* over target. The RDP was shown to have $5.1 million worth of unauthorized growth beyond that funded in 1984 for a new total of *$7.1 million*. The RSP was up $2.9 million over 1984 for a new total of *$4.1 million* in total growth. When asked for a specific plan which reflected their Statement of Work that included the application of resources as well as the schedule which phased those resources, the subcontractor could not produce it. When asked further, how they are managing their fiscal interests in the commonality management plan, they responded that, each week their proportionate percentage share (per the Memorandum of Agreement) is journaled from the common pool of costs to

their program accounts. They do not know in advance what is coming, or for what tasks they are being billed. In other words, they have no control over their participation in the commonality Memorandum of Agreement scheme.

MORE ADDED SCOPE

In June 1985, yet another revision to the 118A MOA was issued under the signatures of Mr. J. R. Rohlinger, Group Vice President and Controller, and Mr. J. R. Giacoletto, Group Vice President. This new revision includes, once again, the funding percentage responsibilities for each of the program offices mentioned previously. The revision increases the number of hardware designs that are being made common to all three programs, thereby increasing the Special Programs investment obligation without prior knowledge or concurrence by the customer.

SUMMARY

One of the glaring deficiencies in this Memorandum of Agreement scheme is that no dollar values have ever been specified, estimated, or even suggested. Only a *percentage* relationship of whatever it costs is indicated.

Through the efforts of the AP-10 Business Manager, the services of a special auditor have been provided through the SPO. The auditor is interfacing directly with the other two SPO's who are participating in these MOA's and will determine whether or not either of the other customers were

aware that they, as well as we, are completely interdependent from a design, schedule, and funding standpoint.

/s/ R. K. Blakeney
R. K. Blakeney
Major Subcontract Administrator
Radar/DMS Systems Subcontracts
P330/2A, Extension 88245

CONCURRENCE:

/s/ S. Rubenstein
S. Rubenstein
Avionics Controller
B551/2A, Extension 24206

/s/ R.C. Davis
R. C. Davis
Radar Engineering
E551/3E, Extension 23849

UNCLASSIFIED

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE AUDIT AGENCY
* AIR FORCE BASE, CA *

Downgraded to UNCLASSIFIED
ON 9/5/90
Date
Authority: Northrop Security Classification
Guide RAA9350-010
Dated: 3 January 1989

Signature

AGS 23 Jun 1986

Report of Audit 86-5, Review of Common Advanced Radar Development Costs

ASD/CC ASD/Y6

1. *Background*: Hughes Aircraft Company, Radar System Group (RSG) is developing, or improving, three radar systems under full-scale development subcontracts from three DOD prime contractors: Northrop for the Advanced Technology Bomber (ATB); McDonnell Douglas for the F-15 Multi-Stage Improvement Program (MSIP), and Grumman for the F-14D. The Northrop subcontract is a cost-plus incentive fee (CPIF) contract with an original definitized value of $155 million (current estimate is $350 million). The McDonnell Douglas subcontract is a fixed price incentive fee (FPIF) contract with a ceiling price of $147.3 million (this contract is currently at ceiling and projecting a loss of about $10 million). The Grumman subcontract is an undefinitized firm fixed price (FFP) contract with a not to exceed price of $409.2 million.

2. Each contract was negotiated as a stand alone effort. The F-15 contract was for development efforts to upgrade their existing system. The upgrade included major subunits that

were to be used on the ATB and would subsequently be used on the F-14D contract. Both the ATB and the F-14D contracts were agreed to by Northrop and Grumman respectively with the understanding that hardware common with other systems would be adapted to their system from off the shelf components. Specifically, the Analog Signal Converter (ASC); Radar Data processor (RDP), and Radar Signal Processor (RSP) will share a total of 31 common hardware items. Fourteen of the 31 hardware items will be used by all three radar systems and the other 17 items will be common to at least two systems.

3. *Scope*: This audit was requested by the Director of the ATS Program Office (ASD/Y6). The objective was to determine whether the costs accumulated by Hughes for the development of common radar hardware accurately reflected resource application and were equitably distributed among the participating programs. Our audit included review of contractual documentation at the F-15 System Program Office, discussions with technical personnel from each program office, discussions with Northrop and Hughes personnel, analysis of common cost data, and review of the internal Hughes common cost Memorandums of Agreement (MOAs). We also obtained assistance from the Defense Contract Audit Agency (DCAA) to provide assurance that charges to the common cost accounts were for actual incurred cost (i.e., there was no double/triple billings). This audit was performed during the period August 1985 to April 1986 and was conducted in accordance with generally accepted government auditing standards.

4. *(U) Overall Evaluation*: Hughes has charged development costs to all three customers that should be borne by the F-15 MSIP. The decision to distribute these costs and the ratio for the distribution were made internally by Hughes with no input from the appropriate government program offices or the prime contractors. The DCAA audit of costs accumulated in the common accounts had not been completed as of the date of this report. We will issue a supplemental report should DCAA

identify significant discrepancies in common account billings. This report and related data have been provided to the Defense Procurement Fraud Unit for further action as they deem appropriate.

5. *Findings*: Hughes had allocated $21.4 million of common hardware development costs to the ATB and F-14D contracts. These costs were, in our opinion, more appropriately chargeable to the F-15 contract. Our analysis of the types of contractor activity charged to six general ledger accounts indicate they are used as cost collection accounts for hardware development of the ASC, RDP, RSP, associated power supplies and related sustaining engineering. As of 24 January 1986, $43 million had been charged to these accounts (Attachment 1) with $40 million billed ($20.3 million to the F-15, $5.7 million to the F-14D and $14 million to the ATB). Hughes developed internal MOAs between the separate Hughes program managers for cost sharing as early as December 1982 and established accounts for the collection of development costs on efforts they deemed common to more than one system. However, the McDonnell Douglas (F-15) subcontract was proposed, evaluated, and negotiated as a stand alone effort. This subcontract required Hughes to design, develop, fabricate, and test the new MSIP radar and did not address any cost sharing with other programs. Therefore, it is our opinion, it was not appropriate for Hughes to allocate any of the nonrecurring development costs for the MSIP items to the other programs.

6. *(U) Auditor's Note*: The McDonnell Douglas (F-15) full-scale development contract is in an overrun condition. Every dollar of development effort charged to that contract is a dollar loss to Hughes. The allocation of development costs to the other contracts reduces their loss. McDonnell Douglas also has 1985 and 1986 *production* contracts with Hughes for MSIP radars. Hughes charged these production contracts for some of the McDonnell Douglas share of the development costs in the "common accounts" thereby further avoiding

losses on the full-scale development contract. F-15 MSIP system program office personnel stated they had identified these charges during a financial review and were pursuing an adjustment from Hughes through their prime contractor.

7. *(U) Recommendations*: ASD/CC should, with participation from the F-14D program office, establish a working group (we suggest chaired by ASD/Y6) to work out a unified position on both the adjustments required for prior charges and a new policy for all remaining efforts on development for all three radar systems. We suggest the group should be authorized to establish ground rules with Hughes for the following:

a. Firm definition of what development efforts are chargeable to each contract.

b. Recoupment for erroneous charges already billed.

c. Continuous review of the overall radar development effort (we suggest the AFPRO be included in the working group and considered for the oversight role).

d. Mutual evaluation of cost vs benefits by program on design and specification changes previously approved and any proposed in the future.

8. *(U) Management Comments*: Management comments (Attachment 2) were responsive to the findings and recommendations in this report.

/s/ J.H. Stolarow
J.H. STOLAROW
The Auditor General

2 Atch
1. Hughes Cost Distribution
2. Management comments
cc: AF/AC
AF/RD-L
AFSC/CC
ASD/TAF

(attachments omitted in printing)

AUDIT REPORT NO. 4511-7B486004 OCT 16 1986

AUDIT REPORT ON REVIEW OF COSTS FOR THE DEVELOPMENT OF COMMON ADVANCED RADAR EQUIPMENT HUGHES AIRCRAFT COMPANY RADAR SYSTEMS GROUP EL SEGUNDO, CALIFORNIA

Under the provisions of Title 32, Code of Federal Regulations, Part 290.26(b) (2), any Freedom of Information Act requests for audit reports received by DCAA will be referred to the cognizant contracting officer for determination as to releasability and a direct response to the requester.

Contractor information contained in this audit report may be confidential. The restrictions of 18 USC 1905 should be considered before this information is released to the public.

This report may not be released to any Federal agency outside the Department of Defense without the approval of Headquarters, DCAA, except to an agency requesting the report in negotiating or administering its contract.

DEFENSE CONTRACT AUDIT AGENCY
LOS ANGELES REGION
HUGHES CORPORATE RESIDENT OFFICE
EL SEGUNDO, CALIFORNIA

FOR OFFICIAL USE ONLY

DEFENSE CONTRACT AUDIT AGENCY
LOS ANGELES REGION
Corporate Resident Office
Hughes Aircraft Company
200 N. Sepulveda Blvd. (E12/C130)
El Segundo, CA 90245/2463

Audit Report No. 4511-7B486004 OCT 16 1986

SUBJECT: Report on Review of Costs for the Development of Common Advanced Radar Equipment
Hughes Aircraft Company
Radar Systems Group

TO: Mr. Timothy J. Boyan
Audit Manager, Special Projects
Air Force Audit Agency/AGS
Building 252, Area C
Wright-Patterson AFB, OH. 45433

1. Purpose and Scope of Review.

a. In accordance with your request, dated 21 march 1986, and subsequent discussions, we have performed a review of the cost incurred for the development of common advanced radar equipment. The review was performed to assure the accounting propriety of these costs.

b. Our review was performed in accordance with generally accepted governmental auditing standards and included such tests of the accounting records and other auditing procedures we considered necessary in the circumstances. It included the following related to the cost incurred for the development of the common advanced radar equipment.

(i) Analysis of monthly direct labor cost from inception to date.

(ii) Analysis of cost adjustments.

(iii) Limited physical observations (floorchecks) of labor recording practices and review of work assignment documents of certain employees who were charging time to the subject effort. Verification of the employees' time card entries to the labor distribution records.

(iv) Coordination with the Air Force Plant Representative Office (AFPRO) technical representatives to determine the validity of the assumptions regarding whether the F-15 contract should bear the full development costs and to determine the reasonableness of the methodology developed by the company for the allocation of the costs to the F-15, F-14D, and the special project programs.

(v) Analysis of the contractor's Cost Accounting Standard disclosure statement to determine its adequacy.

2. Background Information.

The contractor established several holding accounts to accumulate the costs for the development of the common advanced radar equipment. These costs are then allocated monthly to the three programs based on internal agreements made among the three Hughes program managers to share the development costs of the common equipment.

3. Results of Review.

a. Our floorcheck review disclosed that an employee working on an IR&D project was charging to a management pool and having some of his time allocated to the holding accounts. This mischarging occurred from 31 January 1986 until 26 September 1986 and totaled 269.5 hours at a cost impact of $21,861. The contractor has agreed to credit the holding accounts and debit it to one of its IR&D accounts.

b. In addition to the mischarging of 269.5 hours, our review disclosed minor deficiencies in timekeeping procedures which the contractor agreed to correct.

c. The contractor's disclosure statement states, "Direct labor cost incurred for engineering design, support and manufacturing of common hardware is collected in a holding account and is allocated to contracts based on contemplated requirements." It also states, "Direct material cost incurred in the manufacture of common hardware is collected in a holding account and allocated to contracts based on requirements and/or stock transfers." Both the AFPRO and DCAA had found no basis to question the adequacy of the disclosure statement nor compliance with the cost accounting standards.

d. The AFPRO's technical report (See exhibit), which we received on 10 October 1986, states the following:

(1) Based on review of contractual documents, it is their opinion that the F-15 program was intended to bear the full cost of developing any and all hardware used in the F-15 MSIP radar. There are no statements in the documentation for the other two programs which indicate that they will share the burden of development costs.

(2) The facts do not seem to agree with Hughes' assertion that it is "obvious" that the F-15 program was never intended to pay the full cost of the gate array technology.

(3) The wording in the F-14D cost proposal appears to be saying to Grumman Aircraft Company, the prime contractor for the F-14D program, that the development costs for certain parts have already been paid and that Grumman will only have to pay for the production/procurement costs of those parts. However, the internal agreement seems to say that those parts will be developed and the cost should be borne by all using programs.

(4) The entire development engineering to the MSIP radar was negotiated at $57.9 million. The sharing of 31 parts among three programs has already cost over $25 million or almost half the cost to develop the MSIP radar. This appears to be a disproportionately high price to pay for the development of so few parts.

e. The contractor's records indicate the incurrence of about $43 million of cost for the development of the common advanced radar equipment as of 24 January 1986.

f. Our review disclosed no contracted sharing of these common items. Further, we know of no program office direction for this sharing. However, you advised us that you were coordinating this question of sharing with the applicable DOD program offices. Therefore, until the propriety of this sharing question has been resolved, we are unable to reach a definitive conclusion regarding the appropriateness of these charges.

4. Concluding Remarks.

a. Audit matters were discussed with the contractor's representative, Mr. Sam Bulucas, Manager - Cost Accounting, during the course of the review. All questions of fact were resolved.

b. If additional audit services and/or accounting counsel are required concerning this report, please contact Mr. Earnest Knott at (213) 414-6590.

c. Use of this audit report information for purposes other than those immediately intended is not recommended without prior consultation with this office regarding is applicability.

DEFENSE CONTRACT AUDIT AGENCY

/s/ Dudley P. Slater
DUDLEY P. SLATER,
Resident Auditor

Copy furnished
Mr. Tom Tremper, PACO, Hughes AFPRO
RAMD-4

AUDIT REPORT NO. 4511-7B486004S1 JUN 02 1987

SUPPLEMENTAL AUDIT REPORT ON REVIEW OF COSTS FOR THE RADAR SYSTEMS GROUP COMMONALITY POOL HUGHES AIRCRAFT COMPANY RADAR SYSTEMS GROUP EL SEGUNDO, CALIFORNIA

Under the provisions of Title 32, Code of Federal Regulations, Part 290.26(b) (2), any Freedom of Information Act requests for audit reports received by DCAA will be referred to the cognizant contracting agency for determination as to releasability and a direct response to the requestor.

Contractor information contained in this audit report may be confidential. The restrictions of 18 USC 1905 should be considered before this information is released to the public.

This report may not be released to any Federal agency outside the Department of Defense without the approval of DCAA Headquarters, except to an agency requesting the report in negotiating or administering its contract.

DEFENSE CONTRACT AUDIT AGENCY
HUGHES CORPORATE RESIDENT OFFICE
HUGHES AIRCRAFT COMPANY
EL SEGUNDO, CALIFORNIA

DEFENSE CONTRACT AUDIT AGENCY
LOS ANGELES REGION
Corporate Resident Office
Hughes Aircraft Company
200 N. Sepulveda Blvd. (E12/C130)
El Segundo, CA 90245/2463

AUDIT REPORT NO. 4511-7B486004S1 JUN 02 1987

SUBJECT: Supplemental Report on Review of Costs for the Radar Systems Group Commonality Pool
Hughes Aircraft Company
Radar Systems Group
El Segundo, California 90245

TO: Air Force Plant Representative Office
Attention: William D. McKinney, Capt, USAF
Chief Pricing
Section A
Hughes Aircraft Company
El Segundo, California 90245

1. Purpose and Scope of Audit.

a. In accordance with your 19 May 1987 request, we verified the costs incurred by the Radar Systems Group charged to its Commonality Pool. The review was performed to verify the total pool charges incurred for the period from February 1986 to April 1987.

b. The review was performed in accordance with generally accepted government auditing standards and included such tests of accounting records and such other auditing procedures we considered necessary in the circumstances. This review included verification of labor, material, and other direct costs accumulated in common general ledger accounts. These costs were then traced to

general ledger accounts within the F-14, F-15, F-18, and AHEP Programs. A detailed review of these cost flows was not performed due to insufficient time made available to issue this report.

2. Background Information.

The Radar Systems Group Commonality Pool consists of several general ledger accounts used to accumulate costs for the development of common advanced radar equipment. These costs are then allocated to the four programs based on internal agreements made among the Hughes program managers to share in the costs of this common equipment.

3. Results of Audit.

a. Our review disclosed that the contractor's records show $32,215,600 has have been incurred by the Radar Systems Group Commonality Pool during the period from February 1986 to April 1987. This total cost was allocated to the four programs participating in this pool as follows:

F-14	$ 11,632,567
F-15	13,055,891
F-18	352,390
AHEP	7,174,752
TOTAL POOL	$ 32,215,600

b. It should be noted that the above amounts do not include Assist Division's overhead or general and administrative expenses. The contractor stated that these costs were not included due to time constraints. The contractor will update the pool expenses and submit the update to Captain McKinney.

4. Concluding Remarks.

a. If accounting counsel or additional audit services are required concerning this report, please contact Mr. Dale Johnson of this office, at (213) 414-5010.

b. The information contained in this audit report should not be used for purposes other than that immediately intended without prior consultation with this office regarding its applicability.

c. Audit matters were discussed with the contractor's representative, Mr. E. S. Balucas, Manager - Cost Accounting, during the course of the review.

DEFENSE CONTRACT AUDIT AGENCY

/s/ Dudley P. Slater
DUDLEY P. SLATER,
Resident Auditor

DEFENSE CONTRACT AUDIT AGENCY NOTICE OF CONTRACT COSTS SUSPENDED AND/OR DISAPPROVED		PAGE 1 OF 1 PAGE(S)
TO: (*Name and Address of Contractor*) WITHHELD	Contract Number (1) F33657-81-C-0067	Notice Number (2) 001
	Disbursing Officer USAF/AFSC/ASD ASPA PROGRAM OFFICE WRIGHT PATTERSON AFB, OH	Contract Administrative Office WITHHELD

1. This notice is issued pursuant to the authority of DoD Directive §5105.34, as implemented by the Federal Acquisities Regulations and DoD Far Supplement. It constitutes notice of costs suspended and/or disapproved incident to the audit of contractor costs incurred under referenced contract(s). Description of items and reasons for the actions are stated below.

2. SUSPENDED COSTS, as referred to herein are costs which, for the reasons stated below, have been determined by the undersigned to be inadequately supported or otherwise questionable, and not appropriate for reimbursement under the contract terms at this time. Such costs may be determined reimbursable after the contractor provides the auditor additional documentation or explanation as specified below.

3. DISAPPROVED COSTS, as referred to herein, are costs which, for the reasons stated below, have been determined by the undersigned to be unallowable, that is, not reimbursable under the contract terms.

4. If the contractor disagrees with this/these determinations, the contractor may (1) request in writing the cognizant contracting officer to consider whether the unreimbursed costs should be paid and to discuss his or her findings with the contractor and/or (2) file a claim under the "Disputes" clause of this contract(s).

5. The auditor will submit copies of the acknowledged notice to the cognizant disbursing officer for appropriate action and to the cognizant contracting officer.

DCAA AUDITOR	Date of Notice (6) 12/10/87	Address WITHHELD	Signature (illegible)

CONTRACTOR'S ACKNOWLEDGEMENT OF RECEIPT - The contractor or its authorized representative shall acknowledge receipt of this notice to the DCAA auditor.

Date of Receipt (7) 10 December 1987	Name and Title of Authorized Official (7) J. Gaston Kent, Jr.	Signature (7) (illegible)

ITEM NO.	(8) Description of Items and Reasons for Action	Amount of Costs	
		Suspended	Disapproved
1.	Costs reimbursed to subcontractor 118A are suspended at the direction of the Administrative Contracting Officer in accordance with DAR 3-809(c)(1). Government representatives at the subcontractor site have taken exceptions to the subcontractor's allocation methodology used in allocating gate array development costs. The subcontractor accumulated development costs in a common pool and divided the costs among various programs based on subcontractor internal management agreements when, in fact, all development costs were contractually covered in a contract other than one issued by (Withheld). This suspension will remain in effect until such time as the ACO is able to determine the allocability or allowability of these costs as stated in AFPRO letter TM-87-161 dated 11/9/87.	$11,600,000	

UNCLASSIFIED

DEFENSE CONTRACT AUDIT AGENCY NOTICE OF CONTRACT COSTS SUSPENDED AND/OR DISAPPROVED		PAGE 1 OF 1 PAGE(S)
TO: (*Name and Address of Contractor)* Northrop Corporation Advanced Systems Division 8900 E. Washington Blvd. Pico Rivera, CA 90660-3737	Contract Number (1) F33657-81-C-0067	Notice Number (2) 001
	Disbursing Officer USAF/AFSC/ASD (3) ASPA PROGRAM OFFICE WRIGHT PATTERSON AFB, OH	Contract Administrative Office (4) DET 31, AFPRO PICO RIVERA, CA 90660

45433

1. This notice is issued pursuant to the authority of DoD Directive §5105.34, as implemented by the Federal Acquisities Regulations and DoD Far Supplement. It constitutes notice of costs suspended and/or disapproved incident to the audit of contractor costs incurred under referenced contract(s). Description of items and reasons for the actions are stated below.

2. SUSPENDED COSTS, as referred to herein are costs which, for the reasons stated below, have been determined by the undersigned to be inadequately supported or otherwise questionable, and not appropriate for reimbursement under the contract terms at this time. Such costs may be determined reimbursable after the contractor provides the auditor additional documentation or explanation as specified below.

3. DISAPPROVED COSTS, as referred to herein, are costs which, for the reasons stated below, have been determined by the undersigned to be unallowable, that is, not reimbursable under the contract terms.

4. If the contractor disagrees with this/these determinations, the contractor may (1) request in writing the cognizant contracting officer to consider whether the unreimbursed costs should be paid and to discuss his or her findings with the contractor and/or (2) file a claim under the "Disputes" clause of this contract(s).

5. The auditor will submit copies of the acknowledged notice to the cognizant disbursing officer for appropriate action and to the cognizant contracting officer.

DCAA AUDITOR	Date of Notice (6) 12/10/87	Address Resident Auditor, DCAA (6) 8900 E. Washington Blvd., M/S 3M Pico Rivera, CA 90660-3737	Signature (illegible)

CONTRACTOR'S ACKNOWLEDGEMENT OF RECEIPT - The contractor of the authorized representative shall acknowledge receipt of this section to the DCAA auditor.

Date of Receipt (7) 10 December 1987	Name and Title of Authorized Official (7) J. Gaston Kent, Jr. Vice President Contract & Pricing	Signature (7) (illegible)

ITEM NO.	(8) Description of Items and Reasons for Action	Amount of Costs	
		Suspended	Disapproved
1.	Costs reimbursed to subcontractor 118A are suspended at the direction of the Administrative Contracting Officer in accordance with DAR 3-809(c)(1). Government representatives at the subcontractor site have taken exceptions to the subcontractor's allocation methodology used in allocating gate array development costs. The subcontractor accumulated development costs in a common pool and divided the costs among various programs based on subcontractor internal management agreements when, in fact, all development costs were contractually covered in a	$11,600,000	

	contract other than one issued by Northrup Advanced Systems Division. This suspension will remain in effect until such time as the ACO is able to determine the allocability or allowability of these costs as stated in AFPRO letter TM-87-161 dated 11/9/87.		

DCAA Form 1 Supercedes February 1983 Edition of DCAA For 1
August 1987

CLASSIFICATION CHANGED TO:
UNCLASSIFIED
BY AUTHORITY OF [UNREADABLE]
[UNREADABLE]
BY /s/ DATED: [UNREADABLE]

Session No. 88-03-11-402

CONTACT REPORT

Meeting Date: 10 March 1988
DCAA Attendees: Dudley Slater, John Sharenko
Hughes Attendees: E. Levenson, H. Stone

1. Two documents were presented for DCAA review:
   Extracts from Engineering Progress Letters indicating chronology of events (86-11-21-009)

   Letter 88-02-04-400 prepared by Bob Long in response to customer's "Form 1" Notice of Disallowance.

2. Following review of the documents, Howard reviewed the chronology of events:

Apr 1981	Began Special Programs Contract
Jan 1982	AHEP FSD development began
Dec 1982	Established design spec on AHEP ASC
Jan 1983	Began AHEP gate array design
Jun 1983	MSIP/SP Commonality MOA - ASC
Jan 1984	Modification to F15 MSIP Contract to incorporate gate array technology into the F15 ASC.

   DCAA requested an unclassified listing of the chronology of events.

3. DCAA developed the following line of questioning:
   1. When MOA was struck between Special Programs and F15, what transpired with each respective customer (between the buying offices)?
   2. How was MSIP Gate Array work bid? Did the proposal contemplate commonality?

   3. If F-15 MSIP Contract provides for full development costs and if a portion of those costs were subsequently shared with Special Programs, then there should be a contract modification reducing the price of the F15 contract. Where is that credit adjustment?
   4. Same line of questioning re. ARDP. Need to determine what is on contract.
   5. Need to trace each of the 30-or-so MOA's for common parts. Requested copy of each MOA by part number and by date.

4. Edie asked DCAA for breakout of $11.6M disallowance. DCAA has not seen breakdown of the amount but believes the $11.6M amount stems from a modification to the F15 contract to perform the gate array work.

ACTION ITEMS FOR HUGHES:

1. Provide unclassified "chronology of events"
2. Provide copy of MOA by P/N and date for each common item.
3. Determine what was in respective gate array bids re. commonality. Determine whether credit adjustment modifications for commonality exist.

No completion date for these action items was discussed. DCAA recognized that these requests were directed to Hughes in general and interviews with the appropriate other-program people would have to be orchestrated.

AUDIT DISALLOWANCE - COMMONALITY

Date	Accession No.	Discussion
83/04/25	None	F15 MSIP Proposal for new Gate Array 038 and 044 units.
84/01/03	None	F15 MSIP Purchase Order w/M001 Modification dated 24 January 1984
84/06	None	F-15 MSIP Phase II (FSD) WBS Dictionary
86/07/01	86-07-01-001 (S)	Received ltr from Colonel Scofield with draft Audit Report 86-5.
86/07/30	None	File containing documents submitted to the customer during 1982-1983 re. Commonality Audit.
86/09/09	None	Letter from John Wilson to AFPRO Colonel Bottomley with comments on Audit Report 86-5.
86/11/21	86-11-21-009	Collection of excerpts from Engineering Progress Letters indicating evolving maturity of gate array design.
86/11/24	None	Letter from John Wilson to AFPRO Colonel Bottomely with follow-up comments on Commonality Discussions
87/11/24	87-11-24-006	Received DACOM (P323-BEM-87-985) advising Form 1 will be issued - some details provided in DACOM
87/11/30	87-11-30-005 (S)	Letter to Customer acknowledging receipt of 87-11-24-006. Takes exception to cost suspension/disapproval and advises formal response will be submitted by 7 January 1988. Includes copy of Audit Report 86-5 and Hughes letters of 9 Sept 86 and 24 Nov 86.

87/11/30	87-12-01-007	Received letter P323-BEM-87-1000 advising suspension of costs is imposed and requesting a Hughes check for $11.5M.
87/12/16	87-12-16-001	Received DACOM 118A87-712 (P323-BEM-87-1042) advising immediate suspension of costs - debits to FSD invoices. Customer has received Form 1.
87/12/18	87-12-18-006	Received P323-BEM-87-1044, DCAA Form 1.
88/01/05		Edie called Walter to request copy of AFPRO letter TM-87-161 dated 9 Nov 87 (cited in Form 1). Walter will have to check with his lawyer on this. Edie also requested a 30 day extension to respond to Form 1 notice of 87-11-24-006. Walter agreed to extension through first week in February and agreed that I could confirm his concurrence in writing.
88/01/07		Memo from Karl Abert to John Wilson requesting assistance in obtaining AFPRO letter TM-87-161 and identification of specific elements of cost making up the $11.6M amount.
88/01/07		Edie called Captain Hamilton at AFPRO to request AFPRO letter TM-87-161. Cpt. Hamilton advised he will try to find the letter for us.
	88-01-11-402	Letter to Captain Hamilton confirming request for AFPRO letter TM-87-161.
88/01/07	88-01-11-403	Letter to customer confirming request for AFPRO letter TM-87-161 and requesting identification of specific cost elements of the $11.6M withhold.
	88-01-11-404	Letter to customer confirming extension of Form 1 response date to 5 February 1988.

88/01/19		Joe called Walter to follow up on request for cost element breakdown of $11.6M withhold. Walter gave Joe several GLA and cost account numbers. Bob Long was not able to match the cost account numbers from Walter with those in the DCAA Audit Report. Edie called Walter - the cost accounts were Walter's "best guess" based on his review of the 1985 IFC. He didn't have any other relevant data.
88/01/20	88-01-20-400	DACOM and Letter to customer reiterating request for cost element breakdown of $11.6M withhold and advising lack of receipt of this breakdown may impact Hughes' ability to respond by 5 February to Form 1.
88/01/25		Edie called Cpt. Hamilton for status on request for copy of AFPRO letter TM-87-161. Cpt. Hamilton had located the document and requested a copy be DACOM'd to him. He will follow up on his request.
88/02/04	88-02-04-400	Letter to customer responding to Form 1. Includes Statement of Claim and Certification
88/03/08	88-03-08-006	Copy of DACOm from customer DCAA to HAC resident auditor requesting assist audit. Includes customer letter dtd 9 December 87 (X000-87-038) to AFPRO acknowledging AFPRO ltr TM-87-161 dated 13 Nov 87 and reiterating audit request.
88/03/07	None	Meeting with Customer to review F15 MSIP WBS Dictionary, F15 MSIP Proposal for M001 re. gate array technology and F15 MSIP Contract with Modification for M001. See contact report 17 March 88.
88/03/10	None	Meeting with DCAA. See contact report 11 Mar 88.

88/03/11	88-03-11-402	Contact Report of meeting 10 March 88 during which DCAA reviewed the 4 February 88 letter to customer and discussed chronology of events with Howard Stone.

DISTRIBUTION (LAST NAME & INITIAL)	
CONTRACTS (2)	
LIBRARY	
LONG, B.	
ABERT, K.	
OLSON, T.	
PROKOP, R.	
STONE, H.	

DEFENSE CONTRACT AUDIT AGENCY
LOS ANGELES REGION
Corporate Resident Office
Hughes Aircraft Company
200 N. Sepulveda Blvd. (E12/C130)
El Segundo, CA 90245/2463

14 June 1988

Mr. J.R. Rohlinger, Vice President - Finance
Radar Systems Group
Hughes Aircraft Company
RS, Bldg. R-1, M/S D-411
El Segundo, Cailf. 90245

Subject: Cost For Development of Common Advanced Radar Equipment

Dear Mr. Rohlinger

To further assist us in our review, please provide comments and/or additional supporting data as follows:

1. Based on my examination of the revised disclosure statements (D/S) that were provided as per our request, it appears that for period 1980 thru January 1984 the Non-Manufacturing Division, material and labor that was subject to commonality accounting), was *not* a disclosed accounting practice. Please concur, or provide appropriate comments and a copy of cover sheet and applicable pages of the D/S for the subject period. The list of commonality pools provided by you indicates that cost accumulation for Non-Manufacturing effort was opened in C.I.S. in April 1980.

2. Included in the D/S's submitted was a copy of the cover sheet for the revised statement dated 3 January 1983. However, since only the cover sheet was included for this statement, we are unable to determine the relevancy of this statement to the commonality accounting.

3. The following pages were inadvertently omitted. (Appears to have been two sided pages, with only one side copied) Please provide copies of the following *pages* only:

a) Hughes Program Instructions NO. 6-8-10, dtd 11-25-86, *p.2*

b) " " " No. 6-11-10 & Att. 1, dtd 8-26-86, *even numbered pages.*

c) " " " NO. 6-11-12 dtd 3-4-86, *even numbered pages.*

4. Please provide a schedule showing total actual booked cost to all 10 of the commonality pools and a schedule showing the subsequent amounts allocated to each program *for the period 1 January 1986 thru May 1988.* This schedule will be used by us for materiality analysis. Based on this analysis, detail test cheking may be performed using one or more of the commonality pool cost, prior to allocations, and after allocations, as base amounts for detail test checking. Please identify the Phase in which pool costs represents for stated time period.

5. The local AFPRO has requested our report be provided by 9 July 1988. If you should determine that there will be delays in providing the data requested. Please notify me at the (213) 414-6512.

/s/ Van Laurant III
VAN LAURANT III
DCAA AUDITOR

HUGHES
AIRCRAFT COMPANY
RADAR SYSTEMS GROUP

8 July 1988

In Reply Refer To: 88H/20-20/424

Subject: Cost for Development of Common Advanced Radar Equipment

To: Defense Contract Audit Agency
Hughes Aircraft Company
Attn: Van Laurant III, Auditor
Building E12, Mail Station C130
El Segundo, CA 90245

Reference: Your letter dated 14 June 1988

The information requested is submitted in the following paragraphs:

1. Although Commonality was discussed in considerable detail with the AFPRO/DCAA starting 1978, no CAS Disclosure Statement change for commonality accounting was submitted by RSG Non-Manufacturing prior to 1984 because of the lowlevel *(immateriality)* for commonality at that time. It was during the latter part of year 1983 that RSG, at the request of the DCAA/AFPRO, determined that a CAS Disclosure Statement change was in order.

2. The CAS Disclosure Statement change to include commonality accounting for RSG non-manufacturing (Engineering) was included in our Disclosure Statement revision dated 2 January 1984 (submitted 3 July 1984), which was approved by PACO on 1 April 1985 (copy attached).

NOTE: The delay in submitting the 2 January 1984 Disclosure Statement until 3 July 1984 was due to consoli-

dating the individual manufacturing and RSG non-manufacturing CAS Disclosure Statement(s) into a single RSG CAS Disclosure Statement.

3. As requested, attached are complete sets of Hughes Program Instructions. Included are numbers 6-8-0, 6-11-10, and 6-11-12.

HUGHES AIRCRAFT COMPANY

/s/ J.R. Rohlinger
J. R. Rohlinger
Group Vice President - Finance
Radar Systems Group

/bg

Attachments

Audit Report No. 4511-8B179009 27 September 1988

AUDIT REPORT ON REVIEW OF ACCOUNTING PRACTICES FOR THE COMMONALITY COST POOLS
RADAR SYSTEMS GROUP
HUGHES AIRCRAFT COMPANY
EL SEGUNDO, CALIFORNIA

TheDefense Contract Audit Agency has no objection to release of this report, at the discretion of the contracting agency, to authorized representatives of Hughes Aircraft Company.

Under the provisions of Title 32, Code of Federal Regulations, Part 290.26(b)(2), any Freedom of Information Act requests for audit reports received by DCAA will be referred to the cognizant contracting agency for determination as to releasability and a direct response to the requester.

Contractor information contained in this audit report may be confidential. The restrictions of 18 USC 1905 should be considered before this information is released to the public.

This report may not be released to any Federal agency outside the Department of Defense without the approval of Headquarters, DCAA, except to an agency requesting the report in negotiating or administering its contract.

DEFENSE CONTRACT AUDIT AGENCY
SOUTHWESTERN REGION
HUGHES CORPORATE RESIDENT OFFICE
HUGHES AIRCRAFT COMPANY
EL SEGUNDO, CALIFORNIA

FOR OFFICIAL USE ONLY

DEFENSE CONTRACT AUDIT AGENCY
SOUTHWESTERN REGION
Corporate, Resident Office
Hughes Aircraft Company
200 N. Sepulveda Blvd. (E12/C130)
El Segundo, CA 90245/2463

Audit Report No. 4511-8B179009 27 September 1988

SUBJECT: Audit Report on Review of Accounting Practices For The Commonality Cost Pools
Hughes Aircraft Company
Radar Systems Group
El Segundo, California

TO: Principal Administrative Contracting Officer
(Mr. Thomas Tremper)
Air Force Plant Representative Office
Hughes Aircraft Company
El Segundo, California

1. Purpose and Scope of Review

a. As requested in your letter dated 25 May 1988, we have reviewed Hughes Aircraft Company Radar System Group's (RSG) commonality accounting practices. The purpose of the review was to determine i) whether the commonality accounting practices are part of RSG's disclosed accounting practices, ii) whether these commonality accounting practices are considered adequate for the allocation of common radar costs, iii) if adequate, whether HAC has consistently complied with these practices in both accounting for these costs in estimating prior, current and future business, and iv) to obtain and verify the total pool charges incurred in the commonality pools and the subsequent allocation to the various programs through May 30,1988.

b. The review was performed in accordance with generally accepted government auditing standards and included such tests of the contractor's data and records and such other auditing procedures we considered necessary in the circumstances. It included the following specific steps related to the commonality cost accumulation and allocation:

(1) Review of the contractor's Disclosure Statement addressing the initial adoption of the commonality accounting practice, and all applicable revisions.

(2) Review of all written operating instructions and practices on commonality.

(3) Review of all current Memorandums of Agreements (Cost Sharing Provisions) applicable to the ten (10) Commonality Pools.

(4) A detail review of randomly selected labor, material, ODC, and burden transactions recorded under GLA No. NA67. Our review included both cost accumulation and cost allocation transactions.

(5) A review of the contractor's commonality accounting practices in conjunction with bid proposals.

(6) The determination and verification of total costs incurred-to-date for the ten commonality pools, and the total cost allocations-to-date as of May 30, 1988.

2. Circumstances Affecting the Review

On 16 October 1986, we issued Audit Report No. 4511-7B486004, Subject: Audit Report on Review of Costs For The Development of Common Advanced Radar Equipment. The report also included the findings of the resident Air Force Plant Representatives technical review. We disclosed in our report that the contractor established holding accounts to accumulate the costs for the development of the common advanced radar equipment. These costs were then allocated monthly to the F-15, F-14D, F-18 and the AHEP programs based on internal memorandums of agreements made

between the applicable Hughes program managers to share the development costs of the common equipment. Our review disclosed no contracted sharing agreement of these common items. Because we were unable to determine the existence of any program office directions for this cost sharing, we were unable to reach a definitive conclusion regarding the appropriateness and accuracy of these allocations to the various programs.

3. Results of Audit Review

a. Our review disclosed that the contractor's Disclosure Statement and related commonality accounting practices do not adequately describe the contractor's cost accounting practices. Accordingly, we recommend the contractor submit a revised Disclosure Statement on its commonality accounting. Also, during our review we identified certain of the contractor's revised practices which we believe represent a potential noncompliance with Cost Accounting Standard 401. The deficiencies identified are as follows:

(1) Item No. 2.5.0 Method of Charging Direct Labor - Continuation Sheet Page 8 of 60 - Statement dated 17 February 1987

The contractor's disclosed accounting practice for commonality cost is too general. The disclosed practice does not give the reader an adequate description of its methods of allocation and cost sharing arrangements.

Our review indicates that there are presently ten commonality pool accounts used for cost accumulation and ten relief accounts used for cost allocations. The contractor's Memorandums of Agreement defines the common work tasks and establishes the cost sharing of each participating program with respect to a given common work task. We recommend that the contractor include in its disclosure statement a current, accurate, and complete description of each cost sharing practice used for the allocation of common radar costs. Also any subsequent changes to the disclosed practices shall require

the contractor to submit a formal disclosure statement amendment.

(2) Potential Noncompliance-CAS 401

CAS 401.40(b) requires that cost estimates for proposal purposes shall be presented in such a manner and in such detail that any significant cost can be compared with actual cost accumulated and reported. Our review indicates that the contractor simply does not address commonality cost as an element separate and distinct from other unique effort in it's bid proposal estimates. Accordingly, program actuals used as a basis for the proposal estimates do not show a break-down of the common vs unique actual cost. Because proposed commonality costs cannot be compared to the recorded cost, it appears that the contractor has a potential CAS 401 noncompliance. We recommend that the contractor's actual costs which are used as a basis for the proposal estimates show the break-down of actual cost between common vs unique.

b. Except as noted below, our review of selected transactions representing both cost accumulation and allocation transactions disclosed no basis for taking exception to the contractor's current cost accumulation and cost allocation accounting practices.

Our review disclosed that total relief costs allocated-to-date exceeds total costs incurred-to-date for three of the ten pool accounts. Audit inquiries disclosed that the over-allocation resulted from double accounting. The contractor asserts that the double accounting resulted from "changes in allocation matrixes occurring subsequent to the actual periods of cost incurrence". The contractor has agreed to make adjusting correction entries in the September 1988 accounting period. Please refer to Attachment 1, for a schedule showing comparison of total costs incurred-to-date with total relief costs allocated-to-date. Attachment 2 shows the schedule of total commonality pool costs allocated by program.

4. Disposition of Audit Results

a. During the course of our review, audit matters were discussed with Mr. J. Rohlinger, Vice President, Finance, Mr. Sam Bulucas, Manager Cost Accounting, Ms. Jackie Davis, Head, Cost Accounting and Mr. William Amis, Manager, Commonality Hardware.

b. Accounting counsel or additional audit services required may be obtained by contacting Mr. Frank Moore or Mr. Van Laurant III of this office, at (213) 414-6504. Additional audit support should be requested if required.

DEFENSE CONTRACT AUDIT AGENCY

/s/ Dudley P. Slater
DUDLEY P. SLATER,
Resident Auditor

* * * *

Audit Report No. 4511-8B179009 Attachment 1
Page 2 of 2

Explanatory Note

Our review disclosed that total costs allocated-to-date exceeds total costs incurred-to-date for three of the ten pool accounts. Audit inquiries disclosed that the over-allocation resulted from double accounting. The contractor asserts that the double accounting resulted from "changes in allocation matrixes occuring subsequent to the actual periods of costs incurrence". As stated in paragraph 3.b. of the report narrative, the contractor has agreed to make adjusting correction entries in the September 1988 accounting period. In addition, the local AFPRO will be provided a monthly schedule showing total incurred-to-date and total allocated-to-date relif costs, for analysis as considered necessary.

DEPARTMENT OF THE AIR FORCE
AF PLANT REPRESENTATIVE OFC. (DET 36) AF
CONTRACT MGT DIV (AFSC)
HUGHES AIRCRAFT COMPANY, P.O. BOX 92463
LOS ANGELES, CA 90009

7 November 1988

Mr J. R. Rohlinger
Radar Systems Group
Hughes Aircraft Company
R1/MS/D411

Dear Mr Rohlinger

The attached 27 September 1988 DCAA Audit Report No. 4511-88179009 cites a potential CAS 401 noncompliance. The cited noncompliance pertains to the commonality accounting practices for allocation of Common Radar Costs at Radar System Group. Before I make a determination on this potential CAS 401 noncompliance, I request your concurrence with DCAA's audit finding or submit rebuttal evidence within 30 days after receipt of this letter. If you concur with the cited noncompliance please submit your corrective action plan. If no answer is received within 30 days, I intend to issue a determination of noncompliance with CAS 401.

/s/ Thomas R. Tremper
THOMAS R. TREMPER
Principal Administrative
Contracting Officer

1 Atch
DCAA Audit Rpt
No4511-8B1790
dtd 27 Sept 1988

cc: DCAA/Mr D. Slater
DCAA/Mr R. Barr

Dean Francis Pace
Wm. John Kennedy
PACE AND KENNEDY
Suite 1600 Century City
1901 Avenue of the Stars
Los Angeles, California 90067
(213) 277-2900

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA EX REL. WILLIAM J. SCHUMER,	)
Plaintiff,	) CIVIL ACTION) CV 89-0390 MR
v.	)
HUGHES AIRCRAFT COMPANY,	) DISCLOSURE) STATEMENT
Defendant	) PURSUANT TO) 31 U.S.C. 3730 (B)(2)

TO THE UNITED STATES ATTORNEY, CENTRAL DISTRICT OF CALIFORNIA:

NOW COMES RELATOR, WILLIAM J. SCHUMER, and respectfully files a Disclosure Statement with the United States Attorney for the Central District of California incident to the Qui Tam action *United States of America ex rel. William J. Schumer v. Hughes Aircraft Company*, USDC Civil Action CV89-0390 MRP, pursuant to 31 U.S.C. 3730(b)(2).

* * * *

Dated: January 17, 1989

Respectfully submitted,

PACE AND KENNEDY

By /s/ Dean Francis Pace
Dean Francis Pace
Attorneys for Plaintiff

Dean Francis Pace
Wm. John Kennedy
PACE AND KENNEDY
Suite 1600 Century City
1901 Avenue of the Stars
Los Angeles, California 90067
(213) 277-2900

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA EX REL. WILLIAM J. SCHUMER, Plaintiff v. HUGHES AIRCRAFT COMPANY, Defendant	) CIVIL ACTION) COMPLAINT FOR VIOLATION OF THE FALSE CLAIMS ACT) DEMAND FOR JURY TRIAL

JURISDICTION

1.

Jurisdiction is predicated upon federal subject matter jurisdiction pursuant to 31 U.S.C. 3732(a).

VENUE

2.

Venue in the Central District Court for the Central District of California is predicated upon 31 U.S.C. 3737(a). Defendant HUGHES AIRCRAFT COMPANY and its RADAR SYSTEMS GROUP, the entity charged herein with violations of 31 U.S.C. 3729 et seq., now and at all times alleged herein had its principal place of business in the Central District of California. The violations of 31 U.S.C. 3729 et seq. alleged herein occurred in the Central District of California. Plaintiff has sustained the damages alleged herein within the Central District of California.

PARTIES

3.

Defendant HUGHES AIRCRAFT COMPANY (hereinafter "HUGHES"), is and was at all times alleged herein a California corporation with its principal place of business located within the Central District of California.

4.

HUGHES RADAR SYSTEMS GROUP (hereinafter "RSG"), is and was at all times alleged herein a division of HUGHES, charged with the principal performance of subcontracts and prime contracts between HUGHES and the United States Government as hereinafter alleged.

5.

Plaintiff is informed and believes and thereupon alleges, that at all times alleged herein, Defendant HUGHES had knowledge of, acquiesced in, authorized, directed, and/or ratified the conduct of the officers, managers and employees RSG in the performance of the acts as herein alleged.

6.

Plaintiff ex Rel. William J. Schumer (hereinafter "SCHUMER") is and at all times herein alleged was a resident

and citizen of the United States, the State of California, and of the Central District of California. SCHUMER was employed by HUGHES as Division Contract Manager at RSG until September 2, 1988 and at the time of filing the Complaint is employed by HUGHES as Assistant Division Contracts Manager at the HUGHES Missile Systems Group in Canoga Park, California.

7.

The standing of Plaintiff to sue to recovery payments made to Defendant by the United States Government upon false claims is granted by Federal Statute, 31 U.S.C. Section 3730(b)(1).

FIRST CAUSE OF ACTION
VIOLATION OF FALSE CLAIMS ACT

8.

The subject matter of the instant Civil Action are the F-15 Radar Multistage Improvement Program Contract (hereinafter "MSIP CONTRACT"), F-18 Radar Upgrade Program Contract (hereinafter "F-18 CONTRACT") and a classified program designated by the unclassified nomenclature 2301 (hereinafter "2301 SPECIAL PROGRAM CONTRACT") performed by HUGHES RSG at Los Angeles, California.

9.

Plaintiff believes that certain facts may not be alleged without jeopardizing national security. Pending investigation by the United States Attorney of the Disclosure Statement submitted by Plaintiff in compliance with 31 U.S.C. 3730(b)(2), Plaintiff is compelled to leave the allegations contained herein general in nature. The documents, facts and transactions are highly classified and therefore, cannot be disclosed by SCHUMER to his Counsel Pace and Kennedy. SCHUMER is ready, willing and able to make full disclosure to the Justice Department and other federal agencies, including

the 2301 Special Projects Office and Defense Contract Audit Agency, who have the requisite security clearances.

10.

Plaintiff is informed and believes and thereon alleges that the wrongful acts and conduct of Defendant HUGHES as hereinafter alleged with regard *inter alia* to the Commonality Agreement have been confirmed and documented by internal cost analysis, audits and records of HUGHES. Plaintiff is further informed and believes and thereon alleges that said cost analysis, audits and records were circulated among the officers and management personnel of HUGHES who had full knowledge thereof, and who, rather than take corrective or remedial action with regard *inter alia* to the Commonality Agreement, ordered said Commonality Agreement, cost analysis, audits or records suppressed or concealed from the customers of HUGHES including the United States Government.

11.

Plaintiff alleges that the officers, managers, and employees of HUGHES and RSG have acted in furtherance of the above-referenced conspiracy to fraudulently obtain the payment of false claims through the preparation of false records, statements, and invoices, and the collaborative omission and suppression of material facts, as herein alleged.

12.

In doing the acts herein alleged, the officers, managers, and employees of HUGHES RSG were acting in their respective capacities as officers, agents or employees of HUGHES and/or RSG.

13.

Defendant HUGHES knowingly misallocated and mischarged costs incurred on the MSIP FFP CONTRACT to the 2301 SPECIAL PROGRAM CPIF/AF CONTRACT and F-18 FPI CONTRACT in order to receive payment and make profit thereon. Plaintiff alleges that each of the claims for

payment by HUGHES and the payments received by HUGHES constitute false claims within the definitions set forth in 31 U.S.C. 3729(a).

14.

The officers, managers and employees of Defendant HUGHES have conspired to suppress and/or destroy evidence of the false claims in order to prevent its customers, ultimately the United States Government, from becoming aware of the HUGHES false claims and in order to permit HUGHES to continue to receive contract payments and to permit HUGHES to increase its profits in violation of 31 U.S.C. 3729(a).

15.

Beginning in 1983, Defendant Hughes Aircraft Company, Radar Systems GROUP, Los Angeles, California (hereinafter "HUGHES") falsely misallocated and mischarged development costs incurred on the classified F-15 Radar Multistage Improvement Program classified firm fixed price (FFP) contract (hereinafter "MSIP CONTRACT") to two incentive contracts, to wit:

(1) The classified cost plus incentive fee award fee (CPIF/AF) classified contract, bearing the unclassified nomenclature 2301 (hereinafter "2301 SPECIAL PROGRAM CONTRACT"); and

(2) The classified fixed price incentive (FPI) contract for the F-18 Radar Upgrade Program (hereinafter "F-18 CONTRACT").

The United States Government defrayed the development costs of the MSIP FFP CONTRACT to the extent of the incentive share ratios of the 2301 SPECIAL PROGRAM CPIF/ AF CONTRACT and the F-18 FPI CONTRACT without authorization by contract or law and contrary to the no-cost modification to 2301 SPECIAL PROGRAM CONTRACT. The allocation and mischarge was intentional by HUGHES as evidenced by a 1983 Commonality Agreement

signed by the HUGHES MSIP Program Manager Luke Bogdonovich, F-18 Program Manager Freeman Nelson, and 2301 SPECIAL PROGRAM Manager David Lynch (as well as the HUGHES Division Controller Joseph Rohlinger) at the specific request of J.R. Giacoletto, then Director of Contracts and now President of the HUGHES Radar Systems Group and now Vice President of Hughes Aircraft Company (hereinafter "GIACOLETTO"). Meade Livesay, President, HUGHES Radar Systems Group, was also fully informed in 1983.

16.

The misallocation and mischarge was contrary to the 2301 SPECIAL PROGRAM CONTRACT agreements with the HUGHES classified customer (hereinafter "CUSTOMER") and a no-cost modification to the 2301 SPECIAL PROGRAMS CONTRACT. It is estimated by SCHUMER that the total development incurred cost allocated away from the MSIP FFP CONTRACT from 1983-1988 to the 2301 SPECIAL PROGRAM CPIF/AF CONTRACT and to the F-18 FPI CONTRACT exceeds $40,000,000 because of the MSIP technical problems that caused severe cost overruns on the MSIP FFP CONTRACT.

17.

On December 18, 1981, HUGHES was advised that HUGHES had won the full scale development 2301 SPECIAL PROGRAM CONTRACT to employ the existing HUGHES F-15 APG-63 radar processing modules, except for frequency change and repackaging of the modules.

18.

On March 8, 1982, the new 2301 SPECIAL PROGRAM Division was created with SCHUMER as Division Contracts Manager.

19.

On March 18, 1982, HUGHES received the executed 2301 SPECIAL PROGRAM CONTRACT which specified the basic HUGHES F-15 APG-63 radar processing core modules.

20.

In April 1982, the 2301 SPECIAL PROGRAM mission changes caused lengthy negotiations to revise the radar processor core capacity specifications and to determine cost and schedule impacts. There were two main areas of technical concern:

(1) The novel classified antenna approach. The antenna was of such concern that a special Risk Reduction Program was imposed on HUGHES by its CUSTOMER.

(2) The data processing capacity for the Radar Data Processor (hereinafter "RDP"), Analog Signal Converter (hereinafter "ASC") and Radar Signal Processor (hereinafter "RSP") and other modules where processing rates and throughputs were increased beyond the capacity of the existing HUGHES F-15 APG-63 radar modules which were specified in the basic 2301 SPECIAL PROGRAM CONTRACT.

21.

In April, 1982, HUGHES advised the CUSTOMER that HUGHES itself would fund the aforesaid RDP, ASC and RSP increased radar processor core capacity changes at no cost to the CUSTOMER. In December 1982, HUGHES advised the CUSTOMER that HUGHES was anticipating the receipt of a contract for the processor capacity upgrade of the existing HUGHES F-15 APG-63 radar which became the MSIP CONTRACT. In several verbal and written presentations, HUGHES represented to the CUSTOMER:

(1) That the upgrade processor core modules developed on the SIP CONTRACT would be provided to the 2301 SPECIAL PROGRAM at no cost to the CUSTOMER. HUGHES represented to the CUSTOMER there would be a

slight decrease in cost because the upgraded MSIP processor modules would be simpler to frequency change than the existing HUGHES F-15 APG-63 modules.

(2) That HUGHES would meet all processing requirements of the 2301 SPECIAL PROGRAM and retain the specification-required future growth capacity.

(3) That all costs incurred in the development, manufacture and test of the upgrade processor modules would be allocated and charged to the MSIP CONTRACT except for the frequency-change and repackaging of the modules costs.

22.

In January 1983, a no-cost modification for the upgraded processor core modules change was made to the 2301 SPECIAL PROGRAM CONTRACT.

23.

In March 1983, HUGHES received the firm fixed price MSIP CONTRACT for F-15 Aircraft only with no provision for cost allocations to any other aircraft, contract or program.

24.

In July 1983, GIACOLETTO (who had been promoted to Group Vice President on May 19, 1983 but retained his title as Radar Systems Group Director of Contracts) told SCHUMER to "draw up" a "Commonality Agreement" between the 2301 SPECIAL PROGRAM, the F-18 PROGRAM and the MSIP PROGRAM to share equally 1/3, 1/3 and 1/3, all the upgrade processor modules development costs incurred on the MSIP CONTRACT. The Commonality Agreement was to be executed by the then three Program Managers, David Lynch for the 2301 SPECIAL PROGRAM, Freeman Nelson for the F-18 PROGRAM and Luke Bogdonovich for the F-15 MSIP PROGRAM. When SCHUMER asked GIACOLETTO if the customers were aware of the Commonality Agreement, GIACOLETTO was adamant in telling SCHUMER that no word of the agreement

was to reach anyone, especially the 2301 SPECIAL PROGRAM CUSTOMER. When SCHUMER pointed out that HUGHES had assured the CUSTOMER, as evidenced by a no-cost contract modification, that there would no-cost for the upgraded processor modules changes, and that the Commonality Agreement would be "triple-dipping" and a conscious contractual and legal violation, GIACOLETTO directed that the Commonality Agreement be prepared for the signatures of the three program managers and for Joseph Rohlinger who was then HUGHES Division Controller and Group Vice President.

25.

In September 1983, GIACOLETTO demanded to see what SCHUMER had done on the Commonality Agreement. SCHUMER reported that he had done nothing to create the agreement and SCHUMER told GIACOLETTO that he did not want his name associated in any way with the Commonality Agreement.

26.

In October 1983, SCHUMER informed Vern Munushian. Submanager of Contracts (reporting to SCHUMER) on the 2301 SPECIAL PROGRAM (hereinafter "MUNUSHIAN") about the proposed Commonality Agreement. In November 1983, MUNUSHIAN was so concerned that HUGHES might not be fully aware of the contractual and legal implications of the Commonality Agreement that MUNUSHIAN made an appointment to express his concerns to Meade Livesay, President of the HUGHES Radar Systems Group, who listened and said that he would check into the matter. MUNUSHIAN wrote a Memorandum to the File expressing contractual and legal objections to the proposed Commonality Agreement.

27.

On December 15, 1983, GIACOLETTO demanded the Commonality Agreement. SCHUMER told GIACOLETTO

that he would have no part of such a secret arrangement. GIACOLETTO said if you will not do it, I will find someone who will. SCHUMER then wrote a Memorandum to the File documenting the aforesaid transactions with regard to the Commonality Agreement.

28.

In January 1984, SCHUMER was told by GIACOLETTO that MUNUSHIAN was to be removed as Contracts Manager on the 2301 SPECIAL PROGRAM because "he was too close with the customer."

29.

During 1984-1987, at the monthly 2301 SPECIAL PROGRAM review meetings on cost, schedule, technical problems, etc., attended by top-level management, SCHUMER heard the 2301 SPECIAL PROGRAM management (especially the Program Manager David Lynch and Assistant Program Manager Robert Prokopf) frequently complain that the schedule delays and huge cost growth on the 2301 SPECIAL PROGRAM was substantially caused by the unforeseen technical problems and cost escalation on the MSIP PROGRAM which delayed delivery of the MSIP upgraded processor core modules to the 2301 SPECIAL PROGRAM. The cost growth on the 2301 SPECIAL PROGRAM CPIF/AF CONTRACT is classified but it is enormous. The Program Manager David Lynch complained that it was unfair that the 2301 SPECIAL PROGRAM had to absorb 1/3 of the enormous MSIP cost, caused in part as schedule pressure mounted, to the extensive use of overtime premiums which had not been authorized or approved by the CUSTOMER on the 2301 SPECIAL PROGRAM CPIF/AF CONTRACT.

30.

It is the estimate of SCHUMER from the 2301 SPECIAL PROGRAM reviews that incurred cost mischarges to the 2301 SPECIAL PROGRAM under the Commonality

Agreement exceeded $20 million plus a like amount charged to the F-18 FPI CONTRACT.

31.

The second generation Commonality Memorandum of Agreement dated March 15, 1985 provides:

"2.4 (U) SPECIFIC FUNDING AGREEMENTS FOR COMMON HARDWARE

2.4.1. (U) Radar Data Processor (RDP) Unit.

(U) *The initial development phase for the common RDP hardware has been funded solely by the F-15 MSIP Program* and has been completed. Funding for efforts during the present Improvement/Upgrade phase shall be shared equally (1/3 each) among the three programs. These efforts shall include upgrades to the common module designs to implement a dual CPU architecture.

2.4.2. (U) Analog Signal Converter (ASC) Unit.

(U) The development effort for the common ASC modules has been shared equally between the F-15 MSIP program and Special Programs in accordance with a previous Memorandum of Agreement. *Funding for tasks still in the Initial Development Phase shall continue to be shared equally by the F-15 MSIP and Special Programs.* Funding for efforts that have completed the Initial Development Phase shall be shared equally (1/3 each) among the three programs.

2.4.3. (U) Radar Signal Processor (RSP).

(U) The programmable signal processor presently under development, commonly referred to as the NGP (Next Generation Processor), has been funded solely by the F-15 MSIP program. As tasks complete this Initial Development Phase, subsequent funding during the Improvement/Upgrade phase shall be shared equally between the F-15 MSIP program and the F-14D program."

32.

The Commonality Memorandum of Agreement evidences that HUGHES misallocated and mischarged incurred costs away from the MSIP FFP CONTRACT to the 2301 SPECIAL PROGRAM CPIF/AF CONTRACT and F-18 FPI CONTRACT without contractual or legal authorization, or in violation of the no-cost modification to the 2301 SPECIAL PROGRAM CONTRACT, as follows:

(1) For the Analog Signal Converter (ASC) Unit the costs for the Initial Development Phase were misallocated and mischarged equally between the MSIP FFP CONTRACT and the 2301 SPECIAL PROGRAMS CPIF/ AF CONTRACT, so as to be in violation of the no-cost modification and to constitute false claims. Development costs after the Initial Development Phase were misallocated and mischarged equally among the MSIP FFP CONTRACT, 2301 SPECIAL PROGRAM CPIF/AF CONTRACT and F-18 FPI CONTRACT. The cost misallocation and mischarge of one-half of the ASC Initial Development Phase costs away from the MSIP FFP CONTRACT to the 2301 SPECIAL PROGRAMS CPIF/AF CONTRACT as well as the misallocation and mischarge of two-thirds of the subsequent ASC development costs away from the MSIP FFP CONTRACT to the 2301 SPECIAL PROGRAMS CPIF/AF CONTRACT and the F-18 FPI CONTRACT constitute false claims.

(2) For the Radar Data Processor (RDP) Unit, SCHUMER alleges that the assertion by HUGHES that the Initial Development Phase costs were allocated solely to the FFP MSIP PROGRAM, is false. In fact, the Initial Development costs phase were also misallocated and mischarged to the 2301 SPECIAL PROGRAM CONTRACT so as to be in violation of the no-cost contract modification and to constitute false claims. The RDP "Improvement/Upgrade Phase" costs were misallocated equally between the FFP MSIP CONTRACT, the 2301 SPECIAL PROGRAM CPIF/AF CONTRACT and the

FPI F18 CONTRACT. The cost misallocation and mischarge of two-thirds of the RDP "Improvement Upgrade Phase" development costs away from the FFP MSIP CONTRACT to the CPIF/AF BLACK 2301 CONTRACT and to the FPI F18 CONTRACT constitute false claims.

(3) For the Radar Signal Processor (RSP) Unit, SCHUMER alleges that the assertion by HUGHES that the Initial Development Phase (at least for the Next Generation Processor) cost was allocated solely to the MSIP FFP CONTRACT, is false. In fact, the Initial Development costs phase were also misallocated and mischarged to the 2301 SPECIAL PROGRAM CONTRACT so as to be in violation of the no-cost contract modification and constitute false claims.

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. For restitution to the United States Government of all monies wrongfully received by HUGHES to be in excess of $40,000,000.00 or according to proof at the time of trial, pursuant to 31 U.S.C. 3729 et seq.

2. For three times the dollar amount proven to have been wrongfully charged by HUGHES and paid by the United States Government to HUGHES under prime and subcontracts, pursuant to 31 U.S.C. 3729(a) (7);

3. For recovery of all awards or percentages of the proceeds of the action or settlement pursuant to 31 U.S.C. 3730(d);

4. For costs of suit incurred herein including reasonable attorneys fees pursuant to 31 U.S.C. 3730(d);

5. For such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury pursuant to Rule 38(b), Federal Rules of Civil Procedure.

Dated: January 20, 1989

Respectfully submitted,

PACE AND KENNEDY

By: /s/ Dean Francis Pace
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM J. SCHUMER,	) CIVIL ACTION
	) CV89-0201 SVW
Plaintiff,	)
	) MOTION FOR LEAVE
v.	) TO FILE A FIRST
	) AMENDED COM-
HUGHES AIRCRAFT	) PLAINT OR LEAVE
COMPANY, a Delaware	) TO AMEND TO CON-
Corporation	) FORM TO EVIDENCE
	) AT TRIAL
Defendant.	)
	)
	) DATE: July 3, 1989
	) TIME: 1:30 P.M.
_____	) COURTROOM: F

NOW COMES PLAINTIFF and respectfully moves the Court for leave to file a First Amended Complaint or to amend the Complaint to conform to evidence at trial, pursuant to Rule 15(b), Federal Rules of Civil Procedure, to wit:

(1) Fraud and Breach of the Implied Warranty of Good Faith and Fair Dealing for failure to give Plaintiff the promised 1988 midyear performance review admitted by Defendant in its Answer.

(2) Breach of Contract and the Implied Warranty of Good Faith and Fair Dealing for failure to give Plaintiff a 1988 performance, salary and bonus review in violation of the Hughes Aircraft Company Policy and Practice 3-2 to reflect his satisfactory 1988 performance and the Memorandum of commendation dated July 21, 1988.

(4) Breach of Contract and the Implied Warranty of Good Faith and Fair Dealing for the reprisal, retaliation and retribution by Defendant for the Pursuit by Plaintiff in 1988 of the Hughes Aircraft Company Policy and Practice on Employee Dispute Resolution Procedure against his Superior John F. Wilson.

(5) Breach of Contract and the Implied Warranty of Good Faith and Fair Dealing for the reprisal, retaliation and retribution by Defendant for the refusal of Plaintiff to perform an unlawful act under United States Government contracts awarded to Defendant in violation of the False Claims Act, 31 U.S.C. 3729 et seq., *United States of America ex rel. William J. Schumer*, CV89-1963 MRP, under seal until lifted on April 21, 1989 by the United States District Court for the Central District of California, to wit:

(a) In July, September and December 1983, J.R. Giacoletto, then RSG Director of Contract and now RSG President and Corporation Senior Vice President demanded that Plaintiff prepare and secure signatures on a Confidentiality Agreement which was in violation of the United States Government contracts with Defendant on classified Special Programs.

(b) On June 23, 1986, a United States Air Force audit report evidenced the aforesaid contract violations

and false claims to which Defendant responded on September 9, 1986.

(c) Beginning in July 1986, Defendant began restricting Plaintiff from access to the Special Program contracts in order that Plaintiff would not discover the aforesaid unlawful false claims confirmed by the United States Air Force audit.

(d) In July 1987, Plaintiff discovered on the desk of one of his subordinates, Joseph Schulsinger, a Defense Contract Audit Report, DCAA Form 1, which disapproved of the aforesaid false claims confirmed by the United States Air Force audit. Thereupon, Plaintiff was transferred away from the Special Programs organization in order that he would not have access to the aforesaid false claims confirmed in the DCAA Form 1 and United States Air Force audit.

(e) On August 16, 1988, Defendant made a presentation to the USAF AFPRO on the aforesaid Commonality Agreement false claims reported in the DCAA Form 1 and United States Air Force audit.

(f) In August 1988, during an Employee Dispute Resolution Procedure conference with Salvester Mendoza, Corporate EEOC Manager, Plaintiff responded to questions and reiterated his position regarding the aforesaid unlawful acts by Defendant.

(g) On September 2, 1988, Plaintiff was terminated from his employment with Defendant by the change of his office door lock, by the confiscation of his security and employment badges and by escorting Plaintiff from the premises of Defendant for the contrived cause of "management's good faith belief that his continued employment was detrimental to the interests of the organization."

(h) Since February 1989, the aforesaid false claims by Defendant as confirmed by the DCAA Form 1 and

United States Air Force have been under investigation by the Justice Department in Washington, D.C.

The instant motion is predicated upon all of the papers and documents on file herein, the attached Memorandum of Points and Authorities, and the argument by counsel if entertained by the Court.

Dated: June 2, 1989

Respectfully submitted,

PACE AND KENNEDY

By: /s/ Dean Francis Pace
Dean Francis Pace
Attorneys for Plaintiff

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Attorneys for Plaintiff
William J. Schumer

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA EX REL WILLIAM J. SCHUMER, Plaintiff v. HUGHES AIRCRAFT COMPANY, Defendant	) CIVIL ACTION) CV89-0390 MRP) FIRST AMENDED) COMPLAINT FOR) VIOLATION OF) THE FALSE) CLAIMS ACT

NOW COMES PLAINTIFF and alleges:

JURISDICTION

1.

Jurisdiction is predicated upon federal subject matter jurisdiction pursuant to 31 U.S.C. 3732(a).

VENUE

2.

Venue in the Central District Court for the Central District of California is predicated upon 31 U.S.C. 3737(a). Defendant HUGHES AIRCRAFT COMPANY and its RADAR SYSTEMS GROUP, the entity charged herein with violations of 31 U.S.C. 3729 et seq., now and at all times alleged herein had its principal place of business in the Central District of California. The violations of 31 U.S.C. 3729 et seq. alleged herein occurred in the Central District of California. Plaintiff has sustained the damages alleged herein within the Central District of California.

PARTIES

3.

Defendant HUGHES AIRCRAFT COMPANY (hereinafter "HUGHES"), is and was at all times alleged herein a Delaware corporation with its principal place of business located in Los Angeles, California, within the Central District of California.

4.

HUGHES RADAR SYSTEMS GROUP (hereinafter "RSG"), is and was at all times alleged herein a division of HUGHES in El Segundo, California, charged with the principal performance of subcontracts and prime contracts between HUGHES and the United States Government as hereinafter alleged.

5.

Plaintiff ex rel William J. Schumer (hereinafter "SCHUMER") is and at all times herein alleged was a resident and citizen of the United States, the State of California, and of the Central District of California. SCHUMER was employed by HUGHES as Division Contract Manager at RSG until September 2, 1988 and at the time of filing the Complaint is employed by HUGHES as Assistant Division Contracts

Manager at the HUGHES Missile Systems Group in Canoga Park, California.

6.

The standing of Plaintiff to sue to recovery payments made to Defendant by the United States Government upon false claims is granted by Federal Statute, 31 U.S.C. Section 3730 (b)(1).

FIRST CAUSE OF ACTION
VIOLATION OF FALSE CLAIMS ACT

7.

The subject matter of the instant Civil Action are the F14D Program Contract (hereinafter "F14-D CONTRACT"), F-15 Radar Multistage Improvement Program Contract (hereinafter "F-15 MSIP CONTRACT"), F-18 Radar Upgrade Program Contract (hereinafter "F-18 CONTRACT") and B-2 Special Programs Contracts (hereinafter "B-2 SPECIAL PROGRAMS CONTRACTS") performed by HUGHES RSG in El Segundo, California.

8.

Plaintiff believes that certain facts may not be alleged without jeopardizing national security. Pending investigation by the United States Attorney of the Disclosure Statement submitted by Plaintiff in compliance with 31 U.S.C. 3730(b)(2), Plaintiff is compelled to leave the allegations contained herein general in nature. The documents, facts and transactions, are highly classified and therefore, cannot be disclosed by SCHUMER to his Counsel. SCHUMER is ready, willing and able to make full disclosure to the Justice Department and other federal agencies, including the United States Air Force and Navy Special Project Offices and Defense Contract Audit Agency, who have the requisite security clearances.

9.

Plaintiff is informed and believes and thereon alleges that the wrongful acts and conduct of Defendant HUGHES as hereinafter alleged with regard *inter alia* to the Commonality Agreements have been confirmed and documented by internal cost analysis, audits and records of HUGHES. Plaintiff is further informed and believes and thereon alleges that said cost analysis, audits and records were circulated among the officers and management personnel of HUGHES who had full knowledge thereof, and who, rather than take corrective or remedial action with regard *inter alia* to the Commonality Agreements ordered said Commonality Agreements, cost analysis, audits or records suppressed or concealed from SCHUMER and the customers of HUGHES and the Department of Defense, including specifically the United States Air Force and Navy Project Offices.

10.

From 1982 to 1990, Defendant Hughes Aircraft Company, Radar Systems Group, Los Angeles, California (hereinafter "HUGHES") falsely misallocated and mischarged development costs by means of six Commonality Agreements dated December 14, 1982 (hereinafter "AGREEMENT 1"), June 24, 1983 (hereinafter "AGREEMENT 2"), June 24, 1983 (hereinafter "AGREEMENT 3"), February 8, 1985 (hereinafter "AGREEMENT 4"), June 19, 1985 (hereinafter "AGREEMENT 5") and May 8, 1987 (hereinafter "AGREEMENT 6") among the four programs F-14D, F-15 MSIP, F-18 and B-2 SPECIAL PROGRAMS CONTRACTS.

11.

From 1982 to 1990, HUGHES falsely invoiced and the United States Government reimbursed misbid, misallocated and mischarged costs of the F-14D CONTRACT, the F-15 MSIP CONTRACT, the F-18 CONTRACT and to the extent of the incentive share ratios, the B-2 SPECIAL PROGRAMS CPIF/AF CONTRACT without authorization of contract or

law and without the knowledge and approval of the Department of Defense Project or Procurement Offices. The misbid, misallocation and mischarge were intentional by HUGHES as evidenced by six Commonality Agreements signed by the HUGHES F-14 Program Manager J.V. Ferrero, F-15 Program Managers Luke Bogdonovich and R.S. Jamison, F-18 Project Manager E. R. Muntean, and SPECIAL PROGRAMS Manager David Lynch as well as the HUGHES Division Controller Joseph Rohlinger. J.R. Giacoletto, then Director of Contracts and now President of the HUGHES Radar Systems Group and Senior Vice President of Hughes Aircraft Company, approved the six Commonality Agreements.

12.

Without the knowledge or approval of the customers of HUGHES or the Department of Defense, including specifically the United States Air Force and Navy Project Offices, HUGHES unilaterally, secretly and falsely misbid, misallocated and mischarged costs among the F-14D, F-15 MSIP, F-18 and B-2 SPECIAL PROGRAMS CONTRACTS by means of six Commonality Agreements, expressly for the Radar Data Processor, the Analog Signal Converter and the Radar Signal Processor, including without limitation:

(1) December 11, 1982 Commonality Agreement for the Radar Data Processor.

(2) June 24, 1983 Commonality Agreement for the Radar Data Processor.

(3) June 24, 1983 Commonality Agreement for the Analog Signal Converter.

(4) December 3, 1984, Commonality Agreement (MOA dated February 8, 1985) for the Radar Data Processor, Analog Signal Converter, and Radar Signal Processor.

(5) June 19, 1985 Commonality Agreement for the Radar Data Processor, Analog Signal Converter, and Radar Signal Processor.

(6) May 8, 1987 Commonality Agreement for the Radar Data Processor, Analog Signal Converter, and Radar Signal Processor.

In or about 1982, HUGHES agreed to fund the design and development of the Radar Data Processor on the F-15 AFCD and F-15 MSIP CONTRACTS exclusively, whereby cost allocations or charges pursuant to the Commonality Agreements to the F-14D, F-18 and/or B-2 SPECIAL PROGRAMS CONTRACTS constitute false claims. In or about 1982, HUGHES priced and bid the design and development of the Analog Signal Converter including Gate Arrays on the B-2 SPECIAL PROGRAMS CONTRACT, whereby allocations and charges to the B-2 SPECIAL PROGRAMS CONTRACT for the Analog Sinal Converter including Gate Arrays to be adapted to meet the specifications of the F-14D, F-15 MSIP and F-18 CONTRACTS constitute false claims. HUGHES double priced and bid the development of the Analog Signal Converter including Gate Arrays on the F-15 MSIP CONTRACT. The cost allocations and charges for the Analog Signal Converter pursuant to the Commonality Agreements to the F-14D, F-15 MSIP and F-18 CONTRACTS constitute false claims. The development of the Radar Signal Processor was funded solely on the F-15 MSIP CONTRACT to February 8, 1985 when it was made retroactive to September 15, 1984, and thereafter, the costs of the Radar Signal Processor were allocated and charged to the F-14D, F-18 and B-2 SPECIAL PROGRAMS CONTRACTS, which constitute false claims.

13.

Without the knowledge or approval of the customers of HUGHES or the Department of Defense, including specifically the United States Air Force and Navy Project Offices, HUGHES unilaterally, secretly and falsely misallocated and

mischarged costs among the F-14D, F-15 MSIP, F-18 and B-2 SPECIAL PROGRAMS CONTRACTS by means of six Commonality Agreements, expressly for hardware, software, STE, LTE, leasehold, material and procurement, including without limitations:

AGREEMENT: 1

(A) Advanced RDP including refinements and changes (2.1.2).

(B) EDM hardware fabrication, assembly and test (2.1.5).

(C) DSIS and STE hardware design Commonality (2.1.6).

(D) Changes and upgrades to common support software (3.1.3).

(E) DSIS common software, funded solely by SPECIAL PROGRAMS (3.1.5).

AGREEMENT: 2 COVERAGE SAME AS AGREEMENT 1, PLUS:

(A) RDP refinements and changes including Engineering Support (2.1.2).

AGREEMENT: 3

(A) ASC development (2.1.1).

(B) ASC refinements, changes and Configuration Management (2.1.2).

(C) EDM hardware (2.1.5).

(D) STE hardware (2.1.6).

(E) Common Hybrids and gate arrays (2.2).

(F) Operating test and support software (3.1).

(G) Mods and improvements to support software (3.1).

(H) Leasing costs for facilities (4.0).

AGREEMENT: 4 COVERAGE SAME AS AGREEMENT 3, PLUS:

(A) Radar Data Processor (2.4.1).

(B) Analog Signal Converter (2.4.2).

(C) Radar Signal Processor (2.4.3)

(D) Common power supplies (2.4.4).

(E) Common hardware fabrication (2.4.7).

(F) TRI MUX and RSP Power Converter Modules on F-14 and B-2 SPECIAL PROGRAMS (2.4.8).

(G) Configuration management and control of design improvement changes (2.4.8).

(H) Laboratory test Equipment (LTE) on F-15 and SPECIAL PROGRAMS (2.4.9).

(I) DSIS and STE allocated among F-14, F-15 and B-2 SPECIAL PROGRAMS.

(J) Labor, residual material, lot and freight costs (2.4.11).

AGREEMENT: 5 COVERAGE SAME AS AGREEMENT 4, PLUS:

(A) Radar Data Processor (2.4.1).

(B) Analog Signal Converter (2.4.2).

(C) Radar Signal Processor (2.4.3).

(D) Firm memory module (1.2.3).

(E) Sustaining engineering (2.2.3).

(F) Composite hardware requirements (2.4.5).

(G) Engineering material labor and ODC (2.4.11)

(H) Common hardware part specifications (2.4.12)

(I) Common hardware part qualification testing (2.4.12)

(J) Material and process specifications (2.4.13)

AGREEMENT 6: COVERAGE SAME AS AGREEMENT 5.

14.

Without the knowledge or approval of the customers of HUGHES or the Department of Defense, including specifically the United States Air Force and United State Navy Project Offices, HUGHES unilaterally, secretly and falsely misallocated and mischarged costs among the F-14D, F-15 MSIP, F-18 and B-2 SPECIAL PROGRAMS CONTRACTS by means of six Commonality Agreements, expressly for design and improvement changes that should have been the sole prerogative of the Department of Defense, specifically the United States Air Force and United States Navy Project Offices, including without limitation:

AGREEMENT 1:

(A) F-15 Advanced Fighter Capability Demonstration AFCD and B-2 SPECIAL PROGRAMS allocated1/2 and 1/2 (2.1.2).

(B) Identical part numbers (2.1).

(C) No definition of the mechanics of cost allocation.

AGREEMENT 2:

(A) F-15 MSIP and B-2 SPECIAL PROGRAMS allocated 1/2 and 1/2 (2.1.2).

(B) Identical part numbers (2.1).

(C) No definition of the mechanics of cost allocation.

AGREEMENT 3:

(A) F-15 MSIP and B-2 SPECIAL PROGRAMS allocated 1/2 and1/2 (2.1.1).

(B) Identical part numbers (2.1).

(C) No definition of the mechanics of cost allocation.

AGREEMENT 4:

(A) F-14, F-15 MSIP and B-2 SPECIAL PROGRAMS allocated 1/3, 1/3 and 1/3 (2.4).

(B) Different part numbers authorized (2.1).

(C) Commonality Management Board (CMB) established to "... approve equitable cost allocation percentages" (1.3).

(D) Commonality Advisory Committee (CAC) established to "... determine the status of the development phase of common equipment and recommend equitable cost allocation percentages for approval by the CMB" (1.3).

AGREEMENT 5:

(A) F-14, F-15 MSIP and B-2 SPECIAL PROGRAMS allocated 1/3, 1/3 and 1/3 or1/2 and1/2 (2.4).

(B) Different part numbers authorized (2.2).

(C) Defines Commonality Management of CMB, CAC, and subcommittees (1.3).

(D) Establishes cost sharing for sustaining engineering (2.2.3).

(E) Creates specific funding agreement for RDP, ASC, RSP and Power Supplies (2.4.1).

(F) Costs charged to Commonality Account and then transferred out to programs (2.4.7).

(G) Requirements for Commonality plans, reports, reviews, cost accounts and charges per "Commonality Operating Instructions" (2.4.13).

AGREEMENT 6:

(A) F-14, F-15 MSIP, F-18 and B-2 SPECIAL PROGRAMS allocated 1/4, 1/4, 1/4 and 1/4 or 1/3, 1/3, and 1/3 or 1/2 and 1/2 (1.2.3, 2.4.1, 2.4.2, 2.4.3).

(B) Different part numbers still authorized (2.4.7).

(C) Adds duties for CAC Chairman and creates the Commonality Change Management Board (CCMB), Materials and Processes Management Board (MPMB) and Parts Management Board (PMB) (4.8.11).

(D) Costs of CCMB, MDMB and PMB divided by number of Commonality drawings used by each program (4.8.4).

(E) Adds the "Control Level Item" (CLI) for proportional cost allocation (4.8.5).

(F) Material reverts to Commonality Account (4.8.11).

(G) Creates journal from Commonality Account (4.8.11).

(H) Introduces a Contract Allocation Matrix (4.8.11).

15.

The Commonality Agreements dated February 8, 1985 and June 19, 1985 provided that the cost sharing with the F-14D contract was retroactive to September 15, 1984. The Commonality Agreement dated May 8, 1987 provided that cost charged for improvement/upgrade and sustaining engineering was retroactive to September 15, 1984. None of the Commonality Agreements provided for adjusted reallocation of costs or invoices predicated upon the aforesaid retroactive cost allocations to September 15, 1984.

16.

On December 18, 1981, HUGHES was advised that HUGHES had won the full scale development B-2 SPECIAL PROGRAMS CONTRACT to employ the existing HUGHES F-15 APG-63 and F-18 radar processing modules, except for frequency change and repackaging of the modules, with no

provision for cost allocations to or from any other aircraft, contract or program.

17.

On or about March 8, 1982, the new B-2 SPECIAL PROGRAMS Division was created with SCHUMER as Division Contracts Manager. In or about March, 1982, HUGHES received the letter B-2 SPECIAL PROGRAMS CONTRACT which specified the basic HUGHES F-15 APG-63 and F-18 radar processing core modules for the B-2 aircraft with no provision for cost allocations to or from any other aircraft, contract or program.

18.

Beginning in or about April 1982, the B-2 SPECIAL PROGRAMS mission changes caused lengthy negotiations to revise the radar processor core capacity specifications and to determine cost and schedule impacts. There were two main areas of technical concern:

(1) The novel classified antenna approach. The antenna was of such concern that a special Risk Reduction Program was imposed on HUGHES.

(2) The data processing capacity for the Radar Data Processor, Analog Signal Converter and Radar Signal Processor, and other modules where processing rates and throughputs were increased beyond the capacity of the existing HUGHES F-15 APG-63 and F-18 radar modules which were specified in the B-2 SPECIAL PROGRAMS CONTRACT.

19.

On or about October 26, 1982, HUGHES was awarded the definitized B-2 SPECIAL PROGRAMS CONTRACT which provided for the design and development of the advanced Analog Signal Converter including Gate Arrays. In 1982 and 1983, HUGHES double priced and bid the advanced Analog Signal Converter including Gate Arrays on the F-15 MSIP CONTRACT.

20.

In or about March 1983, HUGHES received the fixed price incentive F-15 MSIP CONTRACT for F-15 aircraft only with no provision for cost allocations to or from any other aircraft, contract or program. Effective in or about 1984, HUGHES received the F-14D and F-18 UPGRADE CONTRACTS with no provision for cost allocations to or from any other aircraft, contract or program.

21.

RELATOR is informed and believes, and thereon alleges, that the customers of HUGHES, the Department of Defense and specifically the United States Air Force and United States Navy Project Offices had no knowledge, had not made any advance agreement, and had not approved the misbid, misallocations and mischarges made by HUGHES among the F-14D, F-15 MSIP, F-18 and B-2 SPECIAL PROGRAMS CONTRACTS pursuant to the HUGHES Commonality Agreements, whereby the Contracting Officer caused the suspension of payments to HUGHES on the B-2 SPECIAL PROGRAMS subcontract under Prime Contract F33657-81-C-0067 by the issuance of a DCAA Form 1 pursuant to DOD FAR supplement 42.801 and 42.803. The F-14D, F-15 MSIP, F-18, and B-2 SPECIAL PROGRAMS CONTRACTS did not provide any authorization for the unilateral and secret misbid, misallocations and mischarges by HUGHES among said contracts which have different Congressional Appropriations to different agencies within the Department of Defense.

22.

It is estimated by SCHUMER that the false misbids, misallocations and mischarges by HUGHES among the F-14D, F-15 MSIP, F-18 and B-2 SPECIAL PROGRAMS CONTRACTS from 1982-1990 in the sum of $50,000,000, or according to proof at the time of trial.

23.

Defendant HUGHES misbid, misallocated and mischarged incurred costs among the F-14, F-15 MSIP, F-18 and B-2 SPECIAL PROGRAMS CONTRACTS without contractual or legal authorization from 1982 to 1990, in violation of the Truth in Negotiation Act, 10 U.S.C. 2306(a) and 41 U.S.C. 254(d) and Federal Acquisition Regulations 15.802(a) and (b)(3), and 15.804-2, and 15.806, whereby HUGHES falsely and unlawfully bid and certified proposals on the F-14D, F-15 MSIP, F-18 and B-2 SPECIAL PROGRAMS procurements by the Department of Defense that did not disclose the cost allocations pursuant to the Commonality Agreements without authorization of contract or law, constituting certification violations of Federal Acquisition Regulation 15.804-4 and Defective Cost and Pricing Data in violation of Federal Acquisition Regulation 15.804-7.

24.

Defendant HUGHES knowingly misbid, misallocated and mischarged costs incurred among the F-14D CONTRACT, the F15 MSIP CONTRACT, the F-18 CONTRACT and the B-2 SPECIAL PROGRAMS CONTRACT in order to receive payment and make profit thereon. Plaintiff alleges that each of the claims for payment by HUGHES and the payments received by HUGHES constitute false claims within the definitions set forth in 31 U.S.C. 3729(a).

25.

The number of false claims by HUGHES from 1982 to 1990 that should bear a $5,000 to $10,000 penalty pursuant to 31 U.S.C. 3729(a)(7) is conservatively estimated to be 1,000, whereby at $5,000 the total penalty would be $5,000,000 or at $10,000 the total penalty would be $10,000,000. The number of false claims by HUGHES was derived from the fact that HUGHES vouchered at least weekly on the F14D, F15, F18 and B-2 SPECIAL PROGRAMS CONTRACTS by DD250

vouchers, progress payment vouchers and cost reimbursement vouchers.

26.

The officers, managers and employees of Defendant HUGHES have conspired to suppress and/or destroy evidence of the false claims in order to prevent its customers, ultimately the United States Government, from becoming aware of the HUGHES false claims and in order to permit HUGHES to continue to receive contract payments and to permit HUGHES to increase its profits in violation of 31 U.S.C. 3729(a).

27.

Plaintiff is informed and believes and thereupon alleges, that at all times alleged herein, Defendant HUGHES had knowledge of, acquiesced in, authorized, directed, and/or ratified the conduct of the officers, managers and employees RSG in the performance of the acts as herein alleged.

28.

Plaintiff alleges that the officers, managers, and employees of HUGHES and RSG have acted in furtherance of the above referenced conspiracy to fraudulently obtain the payment of false claims through the preparation of false records, statements, and invoices, and the collaborative omission and suppression of material facts, as herein alleged.

29.

In doing the acts herein alleged, the officers, managers, and employees of HUGHES RSG were acting in their respective capacities as officers, agents or employees of HUGHES and/or RSG.

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

(1) For restitution to the United States Government of all monies wrongfully invoiced by HUGHES and reimbursed by the United States Government to HUGHES in the sum of

$50,000,000, or according to proof at the time of trial, pursuant to 31 U.S.C. 3729 et seq.

(2) For three times the amount wrongfully invoiced by HUGHES and reimbursed by the United States Government to HUGHES under prime and subcontracts in the sum of $150,000,000, or according to proof at the time of trial, pursuant to 31 U.S.C. 3729(a)(7);

(3) For civil penalty of not less than $5,000 and not more than $10,000 for each and every invoice wrongfully submitted by HUGHES for reimbursement by the United States Government and/or prime contractors under United States Government Contracts from 1982-1990 in the sum of $5,000,000 at the minimum $5,000 penalty or $10,000,000 at the maximum $10,000,000 penalty, or according to proof at the time of trial, pursuant to 31 U.S.C. 3730(d);

(4) For all awards or percentages of the proceeds of the action or settlement pursuant to 31 U.S.c. 3730(d);

(5) For costs of suit incurred herein including reasonable attorneys fees and expenses pursuant to 31 U.S.C. 3730(d);

(6) For such other and further relief as the Court deems just and proper.

Dated: April 3, 1990

PACE AND QUINN

By:/s/ Dean France Pace
Dean Francis Pace
Attorneys for Plaintiff
William J. Schumer

STUART M. GERSON
Assistant Attorney General
ROBERT L. BROSIO
United States Attorney
JOHN E. NORDIN II
Asst. United States Attorney
Telephone: (213) 798-3552
MICHAEL F. HERTZ
VINCENT B. TERLEP, JR.
United States Department of Justice
Post Office Box 261
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 304-0474

Attorneys for the United States

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *ex rel.* WILLIAM J. SCHUMER Plaintiff, v. HUGHES AIRCRAFT CO., INC. Defendant.	CV 89-0390 MRP (Bx) NOTICE OF ELECTION BY THE UNITED STATES DECLINING INTERVENTION

TO THE COURT AND ALL PARTIES TO THIS CIVIL ACTION:

Pursuant to the False Claims Act, 31 U.S.C § 3730(b)(2)&(4), the United States of America, by its undersigned attorneys, hereby gives notice to the Court of its election to decline to intervene and proceed with this action at this time.

The United States requests, pursuant to 31 U.S.C. § 3730 (c)(3), that the parties serve copies of all pleadings filed in the action upon it through the undersigned counsel at the below address, and, upon its request and at its expense, that the parties supply the United States with copies of transcripts of depositions taken in this action.

Although the United States has declined, at this time, to enter its appearance in this action, the Court is respectfully referred to 31 U.S.C. § 3730(b) which provides that the relator may carry on the action in the name of the Government, but that "[t]he action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."

Therefore, the United States respectfully requests that should this action be proposed either by the relator or the defendant to be dismissed, settled, or otherwise discontinued, this Court first solicit the consent of the Attorney General through the undersigned attorneys of the United States Department of Justice, before ruling or granting its approval.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

ROBERT L. BROSIO
United States Attorney

JOHN E. NORDIN, II
Asst. United States Attorney

/s/ Vincent B. Terlep, Jr.
MICHAEL F. HERTZ
VINCENT B. TERLEP, JR.
U.S. Department of Justice
Civil Division
Post Office Box 261
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 304-0474
Attorneys for the United States

Dated: May 30, 1990

JAMES J. GALLAGHER
MARK R. TROY
McKENNA & CUNEO
444 South Flower Street, 8th Floor
Los Angeles, California 90071
(213) 688-1000

Attorneys for Defendant
HUGHES AIRCRAFT COMPANY

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *ex rel.*, WILLIAM J. SCHUMER,	)	Civil No. CV 89-0390-MRP
Plaintiff,	)	
vs.	)	AFFIDAVIT OF JOHN F. WILSON
HUGHES AIRCRAFT COMPANY,	)	
Defendant.	)	

I, John F. Wilson, declare and state:

1. I am Director of Contracts for the Radar Systems Group of Hughes Aircraft. I have read the complaint filed by William J. Schumer in the above captioned matter and am familiar with the allegations made therein.

2. On July 30, 1986, the Air Force Plant Representative Office ("AFPRO") held a meeting with Hughes personnel to discuss the findings of an audit conducted by the Air Force

Audit Agency. This meeting addressed the items contained in a Department of the Air Force document entitled "Report of Audit 86-5, Review of Common Advanced Radar Development Costs" (hereafter "audit report"). The document which had previously been classified and has recently been declassified consists of three narrative pages plus two pages consisting of listings of general ledger accounts and dollar amounts. The audit, had been performed during the period of August 1985 to April 1986. A true and correct copy of the three narrative pages is attached hereto as Exhibit 1.

3. The audit report stated that the purpose of the audit was to examine costs accumulated by Hughes for the development of certain radar hardware common to three radar systems programs -- the B-2, the F-15 Multistage Improvement Program ("MSIP"), and the F-14D -- and to determine whether the costs accumulated for the development of the common subunits were "equitably" distributed among [sic] the participating programs." Exhibit 1 (Audit report) ¶¶ 1, 3.

4. The audit report alleged that certain subunits developed under the F-15 program were to be used on the B-2 and F-14D programs, but that the F-15 program was to bear the full costs for that development effort. The report identified the common subunits as the Radar Data Processor, Analog Signal Converter, and Radar Signal Processor. Exhibit 1 (Audit report) ¶ 2.

5. The audit report alleged that the F-15 program "was proposed, evaluated, and negotiated as a stand-alone effort . . . requir[ing] Hughes to design, develop, fabricate, and test the new [F-15] radar and did not address any cost sharing with other programs." Exhibit 1 (Audit report) ¶ 5.

6. The audit report alleged that "Hughes developed internal [Memorandums of Agreement ("MOA's")] between separate Hughes program managers for cost sharing as early as December 1982 and established accounts for the collection of development costs on efforts they deemed common to more than one system." Exhibit 1 (Audit report) ¶ 5.

7. The audit report alleged that "it was not appropriate for Hughes to allocate any of the non-recurring development costs for the [F-15] items to the other programs." Exhibit 1 (Audit report) ¶ 5.

8. The audit report alleged that "Hughes has charged development costs to all three customers [i.e. the B-2, F-14D and F-15 MSIP] that should be borne by the F-15 MSIP. The decision to distribute these costs and the ratio for the distribution were made internally by Hughes with no input from the appropriate government program offices or the prime contractors." Exhibit 1 (Audit report) ¶ 4.

9. The audit report alleged that since the F-15 contract was in an overrun condition, "every dollar of development effort charged to that contract is a dollar loss to Hughes. The allocation of development costs to the other contracts reduces [Hughes'] loss." Exhibit 1 (Audit report) ¶ 6.

10. On December 10, 1987, the Defense Contract Audit Agency ("DCAA") issued a "Notice of Contract Costs Suspended and/or Disapproved" which suspended a substantial amount of cost under Hughes' cost reimbursement contract on the B-2 Programs. A true and correct copy of the DCAA notice, in the form received by Hughes, is attached hereto as Exhibit 2.

11. Generally, audit reports questioning the allowability of costs and alleging defective pricing are routinely provided to contractors to enable them to prepare appropriate responses. Hughes prepared and submitted its response to the Air Force and is in the process of submitting a formal claim for reimbursement of its costs, now that the Department of Justice has completed its investigation and determined not to intervene in Schumer's action.

I declare under penalty of perjury that the foregoing is true and correct. If called upon, I could testify to the matters contained herein.

Executed this 7th day of September, 1990, at Los Angeles, California.

/s/ John F. Wilson
John F. Wilson

DEFENSE LOGISTICS AGENCY
DEFENSE PLANT REPRESENTATIVE OFFICE
HUGHES LOS ANGELES
P.O. BOX 92463
LOS ANGELES CALIFORNIA 90009-2463

DCMDW-RKA September 19, 1990

SUBJECT: Request for Audit Comment on Cost Accounting Standards Aspect of RSG Commonality Issue

TO: DCAA/J. McGowan

1. Request DCAA review and comment on the Cost Accounting Standards (CAS) aspects of the RSG commonality issue. The issue originated from Air Force Audit Agency (AFAA) Report 86-5, which found that the contractor had allocated development costs between major radar programs based upon internal Memorandums of Agreement (MOAs or commonality agreements). An unclassified copy of the AFAA report provided by the company is encl 1. Based upon the AFAA report, DCAA audit reports (encl 2 and 3), and AFPRO technical reviews it was recommended that the plant office cognizant of the prime contractor withhold $15 mil. In a parallel action a qui tam suit was brought against Hughes by a former RSG contracts manager for the use of commonality agreements and the suit was reviewed by the Dept of Justice (DOJ). In approximately May 90, DOJ chose not to join the qui tam action, and RSG requested release of the $15 mil suspension from the prime. The DPRO recommended against release of the suspension due to the unresolved issues (encl 4).

2. It appears that the contractor was in conflict with their disclosed accounting practices when they allocated development costs between contracts in accordance with the commonality agreements. Prior to 1984 RSG had three (3) separate Disclosure Statements; Group Office, Non-Manufacturing Division, and Manufacturing Division. The specific area of

the Disclosure Statement at issue is Item No. 2.5.0, Method for Charging Direct Labor. The Manufacturing Division wording for Section 2.5.0.Y (4) was as follows:

> Direct labor cost incurred in the manufacture of common hardware is collected in a holding account and is allocated to contracts based on requirements times standards.

There was no provision for the allocation of *development* costs between contracts in the Non-Manufacturing Division Disclosure Statement.

3. On 5 Jul 84, the contractor submitted a revised Disclosure Statement, dated 2 Jan 84, which consolidated the three separate Disclosure Statements and included among other things "Refinements to statements describing the procedures for Commonality Pools in effect at RSG". Specifically, this revision revised Item 2.5.0.Y (4) as follows:

> Direct labor cost incurred for engineering design, support and manufacture of common hardware is collected in a holding account and is allocated to contracts based on contemplated requirements.

It appears that the Disclosure Statement was reviewed by DCAA Audit Report 4521-5A441400, dated 26 Feb 85, (encl 6) and it was the audit opinion that the statement adequately described the contractor's accounting practices and no instances of non-compliance were observed. On 1 Apr 85, the PACO approved the Disclosure Statement and requested submittal of a total cost impact statement (encl 7). The limited DPRO records do not show any evidence that the cost impact of the change in allocating engineering design labor was ever addressed by the contractor. (It does appear that the cost impact of other accounting changes in the Disclosure Statement were addressed).

4. Due to the time critical nature of this issue, your expedited comments are requested by 26 Sep 90. The support is appreciated.

/s/ Brian Reilly
BRIAN F REILLY, Principal
Administrative Contracting
Officer

7 Encl
1. AFAA Report 86-5, undated
2. DCAA Audit 4511-7B486004
3. DCAA Audit 4511-7B86004S1
4. PACO ltr, dtd 2 Aug 90
5. HAC ltr, dtd 5 July 84
6. DCAA Audit 4521-5A441400
7. PACO ltr, dtd 1 Apr 85

FOR OFFICIAL USE ONLY

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McKENNA & CUNEO
444 South Flower Street, 8th Floor
Los Angeles, California 90071
(213) 688-1000

Attorneys for Defendant
HUGHES AIRCRAFT COMPANY

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *ex rel.*, WILLIAM J. SCHUMER,	) Civil No. CV 89-0390-MRP
Plaintiff,	) SUPPLEMENTAL
vs.	) AFFIDAVIT OF JOHN F. WILSON IN
HUGHES AIRCRAFT COMPANY,	) SUPPORT OF DEFENDANT'S
Defendant.	) MOTION FOR SUMMARY JUDGMENT F.R.C.P. 56(b)
	) Date: October 29, 1990
	) Time: 10:00 a.m.
	) Courtroom: Hon. Mariana Pfaelzer

I, John F. Wilson, declare and state:

1. I am Director of Contracts for the Radar Systems Group of Hughes Aircraft Company ("Hughes"). This Affidavit is a supplement to my Affidavit executed on September 7, 1990, in support of Hughes' motion for summary judgment.

2. For purposes of Hughes' motion for summary judgment, the disclosures of the Air Force Audit Agency Report No. 86-5, entitled "Review of Common Advanced Radar Development Costs," (attached as Exhibit 1 to the Affidavit of John F. Wilson), and the Defense Contract Audit Agency ("DCAA") Form 1 "Notice of Contract Costs Suspended And/Or Disapproved," (attached as Exhibit 2 to the Affidavit of John F. Wilson), which are at issue, are limited to disclosures made to Northrop Corporation and to Hughes Aircraft Company.

3. The response by Hughes to the Air Force Audit Agency Report (Exhibit 1) and the DCAA Form 1 (Exhibit 2) is not in any way relevant to Hughes' motion for summary judgment.

4. Hughes received the Air Force Audit Agency Report (Exhibit 1) on July 30, 1986.

5. Hughes received the DCAA Form 1 (Exhibit 2) on December 10, 1987.

6. The Hughes copy of the Air Force Audit Agency Report (Exhibit 1) remained classified "SECRET" as of January 23, 1989, and remained classified until September 5, 1990, when it was declassified.

7. The DCAA Form 1 (Exhibit 2) has never been classified.

8. Hughes did not receive and does not possess the "Management Comments" referenced in the Air Force Audit Agency Report (Exhibit 1).

9. The word "withheld" which appears three times on the DCAA Form 1 (Exhibit 2) was on said DCAA Form 1 when it was received by Hughes.

I declare under penalty of perjury that the foregoing is true and correct. If called upon, I could testify to the matters contained herein.

Executed this 28th day of September, 1990, at Los Angeles, California.

/s/ John F. Wilson
John F. Wilson

NORTHROP

B-2 Division
Northrop Corporation
8900 East Washington Boulevard
Pico Rivera, California 90660
Telephone 213 942-3000

DECLARATION

I, Laurie L. Bilbruck hereby declare that I am employed as Manager, Subcontract Administration at Northrop Corporation and, on 31 August 1989 was designated as the Custodian of Records for all documents relating to Hughes Aircraft Company Commonality Agreements and the sharing of costs between 2301 Special Program, F-15 Radar Multistage Improvement Program and F-18 Radar Program.

I further declare that the within and attached pages are true and correct copies of original documents or the best copy available of the following documents:

Memo dated 15 June 1984 from R.J. Soikkeli to B. George requesting Government Audit Assistance.

Memo dated 13 February 1985 from R.C. Davis to S. Rubenstein attaching 1982 Hughes memo and MOA.

Whitepaper on "Radar Commonality" dated 20 February 1986.

Memo dated 17 March 1986 from R.P. Francis to R.J. Soikkeli.

Letter dated 14 May 1986 from W.R. Duke to J. Shulsinger of Hughes regarding "Potential Cost Disallowance."

DCAA Form 1 dated 10 December 1987.

I further declare that I am unable to locate the Air Force Audit Report dated June 23, 1988 requested by the Deposition Subpoena under Case Number CV89-0390 MRP because the date

appears to be in error. A document dated June 23, 1986 was located. However, it is classified "SECRET" and cannot be transmitted with this declaration.

IN WITNESS THEREOF, I have hereunto set my hand at Pico Rivera, California on this 12th day of October 1990.

/s/ Laurie L. Bilbruck
Laurie L. Bilbruck

(attachments omitted in printing)

DCMDW-RKA 5 Feb 91

SUBJECT: Freedom of Information Act (FOIA) Request

TO: Mr. John P. Wilson, Contracts Director
Radar Systems Group
RS, R01, 12Z32

References: (a) Pace, Quinn and Rose letter, dated 2 Jan 91.
(b) Pace, Quinn and Rose letter, dated 11 Jan 91.

The DPRO has received the attached FOIA requests for information related to B-2 subcontracts awarded to Hughes Aircraft Company by Northrop Corporation. Your comments are solicited regarding these FOIA requests.

Sincerely,

2 ENCL
A/S

/s/ Brian Reilly
Brian Reilly, Principal
Administrative Contracting
Officer

HUGHES
RADAR SYSTEMS GROUP

11 February 1991

To: Mr. Brian Reilly,
Principal Administrative Contracting Officer

Subject: Freedom of Information (FOIA) Request

Reference: Your letter, dated 5 February 1991, same subject, reference: DCMDW-RKA

Thank you for soliciting Hughes Aircraft Company comments concerning Pace, Quinn and Rose letters dated 2 and 11 January 1991.

We are not specifically aware of what, if any, of the audit reports and records being sought by Mr. Dean Francis Pace the Defense Contract Audit Agency has in its possession. We can only evaluate Mr. Pace's request if we are provided with copies of these documents or are advised of their contents.

Notwithstanding, we object to the release of the types of documents requested as they would contain "trade secrets and commercial or financial information" which is "privileged or confidential" to Hughes under exemption (b) (4) of 5U.S.C.552.

Sincerely,

HUGHES AIRCRAFT COMPANY
Radar Systems Group

/s/ John F. Wilson
John F. Wilson
Director Contracts

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MARIANA R. PFAELZER,
JUDGE PRESIDING

U.S.A. EX REL WILLIAM J. SCHUMER, PLAINTIFF,	)	
VS.	)	NO. CV. 89-390 MRP
HUGHES AIRCRAFT COMPANY,	)	
DEFENDANT.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA

MONDAY, FEBRUARY 11, 1991

BETH ESTHER ZACCARO
OFFICIAL COURT REPORTER
414 UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012
(213) 626-2622

LOS ANGELES, CALIFORNIA: MONDAY, FEBRUARY 11, 1991: 10:00

THE CLERK: ITEM NUMBER FIVE, CIVIL 89-390. U.S.A. EX REL WILLIAM J. SCHUMER VS. HUGHES AIRCRAFT COMPANY.

COUNSEL: PLEASE MAKE YOUR APPEARANCES.

MR. PACE: GOOD MORNING, YOUR HONOR, DEAN PACE FOR PLAINTIFF.

MR. GALLAGHER: GOOD MORNING, YOUR HONOR, JAMES J. GALLAGHER AND MARK TROY FOR THE DEFENDANT.

THE COURT: ALL RIGHT.

I HAVE LOOKED OVER THE FILE, AND IT SEEMS TO ME THAT IT WOULD BE APPROPRIATE TO LET YOU GO ON UNTIL THE END OF OCTOBER WITH THE DISCOVERY AND SET THE LAST DAY OF - OCTOBER --- IF THAT IS A COURT DAY -- FOR THE FILING OF MOTIONS.

ARE YOU GOING TO FILE MOTIONS?

MR. PACE: YES, YOUR HONOR.

THE COURT: WHAT DO YOU HAVE IN MIND?

MR. PACE: I BELIEVE THIS IS A MATTER OF SUMMARY JUDGMENT, YOUR HONOR. THE FACTS ARE REALLY NOT IN DISPUTE .

I BELIEVE THIS COURT SHOULD DETERMINE IF BY SUMMARY JUDGMENT AND IF NOT, THIS WILL BE A TRIAL BEFORE THE COURT BECAUSE OF THE HIGHLY CLASSIFIED NATURE OF THESE MATTERS. IT WOULD BE IMPOSSIBLE TO IMPANEL A JURY, SO VIRTUALLY IF WE COULD PRESENT THE EVIDENCE TO THE COURT BY WAY OF SUMMARY JUDGMENT, IF

THE COURT WOULD DECIDE THAT THERE SHOULD BE A TRIAL AT LEAST ON CERTAIN MATTERS, I AM CONFIDENT THAT WE COULD LIMIT THE ISSUES THAT WOULD HAVE TO BE TRIED BEFORE THIS COURT.

IT IS MY HOPE TO FILE A MOTION FOR PARTIAL SUMMARY JUDGMENT QUITE SOON.

THE COURT: NOW THAT IS ON THE LIABILITY ASPECT OF THE CASE?

MR. PACE: PERHAPS BOTH, YOUR HONOR.

THE COURT: HUM-HUM.

MR. PACE: IF IT PLEASES THE COURT, MAY I INFORM THE COURT OF TWO DEVELOPMENTS THAT HAVE OCCURRED SINCE WE FILED THAT JOINT STATUS REPORT.

FIRST THERE HAS BEEN NO COMPLIANCE WITH DISCOVERY BY DEFENDANT HUGHES AIRCRAFT COMPANY.

INTERROGATORIES, REQUESTS FOR PRODUCTION AND NOTICE OF A RULE 30(B)(6) WITNESS WAS FILED OR SERVED THE FIRST WEEK OF JULY, AND THROUGH VARIOUS DELAYS, HAS BEEN CONTINUED INCLUDING AN ORDER BY MAGISTRATE BROWN TO FEBRUARY 4TH WHICH WAS LAST MONDAY, AND THIS STATUS CONFERENCE WAS CONTINUED A WEEK BECAUSE OF THAT.

THE COURT: YES.

MR. PACE: LAST MONDAY THERE WAS ABSOLUTELY NO PRODUCTION OF DOCUMENTS.

I WAS INFORMED THAT THERE MAY BE AS MANY AS NINE RULE 30(B)(6) WITNESSES, BUT I WAS INFORMED THAT ALL NINE OF THEM AND COUNSEL

WERE UNAVAILABLE FOR THEIR DEPOSITIONS AS NOTICED LAST MONDAY.

THERE WERE OBJECTIONS TO INTERROGATORIES AND SOME ANSWERS THAT REFERRED TO DOCUMENTS THAT WERE NOT PRODUCED OR INCORPORATED OTHER ANSWERS WHICH ARE CLEARLY IN VIOLATION OF THE COMPLIANCE WITH DISCOVERY.

WE HAD A LOCAL RULE 715 MOTION IN MY OFFICE LAST MONDAY NIGHT AT 6:00 O'CLOCK. I WAS INFORMED THAT DEFENDANT WOULD RECONSIDER PREDICATED UPON NARROWING SOME OF THE REQUESTS.

LATER IN THE WEEK I WAS INFORMED THAT THEIR CLIENT WAS OUT OF TOWN UNTIL THURSDAY AND I JUST THIS MORNING FIVE MINUTES BEFORE TRIAL INDICATE THAT THEY ARE GOING TO PRODUCE CERTAIN UNCLASSIFIED DOCUMENTS ON WEDNESDAY, THE 13TH BUT NO MENTION ABOUT THE RULE 30(B)(6) WITNESSES AND NO MENTION WITH REGARD TO THE INTERROGATORIES WHICH AGAIN IS GOING TO REQUIRE FURTHER MOTIONS BEFORE MAGISTRATE BROWN.

THIS DISCOVERY IS CRITICAL TO UNDERSTAND THE REASON WHY HUGHES AIRCRAFT COMPANY TOOK THE POSITIONS THAT IT HAS TAKEN CLEARLY CONTRARY TO D.C.A.A. POSITIONS AS WE KNOW THEM THROUGH THE JUSTICE DEPARTMENT, AND FOR EXAMPLE, YOUR HONOR, UNDER THE COST ACCOUNTING STANDARDS BOARD THERE IS A DISCLOSURE STATEMENT FILED UNDER PENALTY OF PERJURY FOR CONTRACTS IN EXCESS OF TEN MILLION DOLLARS WHERE AN AEROSPACE CONTRACTOR IS REQUIRED TO REVEAL THE METHOD IN WHICH IT WILL ACCUMULATE AND ALLOCATE

COSTS AND THAT IT WHAT THIS CASE IS ALL ABOUT.

HUGHES AIRCRAFT COMPANY FAILED TO NOTIFY THE GOVERNMENT OF THESE UNIQUE MATTERS IN WHICH THEY HAVE ACCUMULATED AND ALLOCATED COSTS ON THE B2 PROGRAM, F14, 15 AND 18 CONTRACTS WHICH ARE AT ISSUE IN THIS CASE.

IT IS IMPERATIVE FOR PLAINTIFF BEFORE WE GO TO THE GOVERNMENT TO GAIN ALL OF THESE AUDIT REPORTS, D.C.A.A. FORM 1'S WHERE D.C.A.A. HAS ALREADY SUSPENDED ELEVEN MILLION EIGHT HUNDRED THOUSAND DOLLARS OF COSTS AS UNREIMBURSIBLE ON THE B2 CONTRACT ALONE.

WE NEED TO KNOW WHAT THEIR POSITION IS, AND THIS HAS BEEN TERRIBLY COMPLICATED BY THE FACT THAT SEVEN OR EIGHT MONTHS AFTER NOTICED DISCOVERY WE DON'T HAVE ANY.

THE SECOND THING I WOULD LIKE TO ADVISE THE COURT IS THIS.

INCONCEIVABLE AS IT IS, DEAN PACE TURNS OUT TO BE THE ONLY QUI TAM COUNSEL OF THE HUNDREDS OF QUI TAM CASES FILED THAT HAVE TWO CRITICAL HIGH SECURITY MATTERS PENDING.

I AM ADVISED THIS BY THE JUSTICE DEPARTMENT.

IF THE COURT WILL RECALL LAST MARCH AT THE STATUS CONFERENCE THE COURT SUGGESTED THAT BECAUSE COUNSEL FOR HUGHES AIRCRAFT COMPANY HAD TWO COUNSEL THAT WERE CLEARED THAT IT WOULD BE APPROPRIATE THAT THE RELATOR'S COUNSEL

* * * *

DEFENSE LOGISTICS AGENCY
DEFENSE CONTRACT MANAGEMENT COMMAND
DEFENSE PLANT REPRESENTATIVE OFFICE
HUGHES LOS ANGELES
P. O. BOX 92463
LOS ANGELES, CALIFORNIA 90009-2463

DCMDW-RKA 25 Mar 91

SUBJECT: Freedom of Information Act (FOIA) Request

TO: Mr. John F. Wilson, Contracts Director
Radar Systems Group
RS, R01, 12Z32

We received a revised request from Pace, Quinn and Rose under the Freedom of Information Act (FOIA) for documents and information pertaining to B-2, F-14, F15 and F18 subcontracts awarded to Hughes Aircraft Company (HAC) and specifically the following:

(1) DCAA Audit Reports and DCAA Forms 1 and 2000, including DCAA Form 1 dated 10 Dec 87;

(2) Air Force Audit Agency (AFAA) Report 86-5 and subsequent AFAA or DCAA reports;

(3) 30 Jul 86 meeting [minutes] between the AFPRO and HAC to discuss the AFAA report;

(4) Northrop request for Government Audit Assistance dated 15 Jun 84; and

(5) the HAC Statement of Claim Re Suspension of Gate Array Radar Development Costs dated 4 Feb 88, including any supplemental HAC claims or actions thereon by the Government.

To determine the releasability of the information contained in these documents, and to give you the maximum protection under the law, we ask that you review the documents and give us the information required by the attachment to this letter entitled "Requirements of Exemption 5 U.S.C. 552(b)(4)."

Sincerely,

/s/ Thomas E. Woolpert
THOMAS E. WOOLPERT
Capt, USAF
Contracting Officer

2 Encl:
1. Requirements of Exemption 5 U.S.C. 552 (b)(4)
2. List of Documents w/Atch

REQUIREMENTS OF EXEMPTION 5 U.S.C. 552 (b)(4)

The Freedom of Information Act (FOIA), as amended in 1974 by Public Law 93-502, requires federal agencies to provide virtually all agency records, unless specifically exempted, for public inspecting and copying. Section (b) of the Act contains nine exemptions that are the only basis for withholding records from the public. We are concerned here with the fourth exemption which provides that "trade secrets and commercial or financial information obtained from a person and privileged or confidential" may be withheld from requesters (5 U.S.C. 552(b)(4)).

To establish that the information requested is covered by the fourth exemption of the FOIA, the information requested must be a trade secret, commercial or financial information, obtained from a person, and privileged or confidential information. The United States Circuit Court of Appeals for the District of Columbia has held that:

> Commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (1974).

The court has indicated that even though the government may have no interest in keeping the information secret, "the exemption may be invoked for the benefit of the person who has provided commercial or financial information if it can be shown that public disclosure is likely to cause substantial harm to his competitive position."

If you feel that the release of subject material would be prejudicial to your commercial interests, and desire that the

government invoke the exemption for your benefit, please notify this office in writing before *29 March 1991* . Your notification should clearly identify those specific portions of the material that you wish withheld, including your basis therefore. Your notice should not be merely a conclusory legal argument. We are prepare to apply the law, but we need a detailed factual discussion from you. You should keep in mind that the Act requires that any reasonably segregable portion of a record be provided to requesters, after deletion of exempt portions. Therefore, if the deletion of key words or phrases would adequately "sanitize" the material to protect your interests, please so indicate. If you are unable to substantiate the adverse impact on your competitive position or to your commercial interest, the information may be released to the requester.

Under the FOIA, this office must respond to the requester by *2 April 1991* ; therefore, we need your input by *29 March 1991* . If you have any questions concerning this matter, you may contact *Mr. Brian F. Reilly* at *(213) 414-6446* .

LIST OF DOCUMENTS

DATE	PARA IN REQUEST	SUBJECT	TO
10 Dec 87	(1)	DCAA Form 1, Notice #001	NORTHROP(N)
27 Sep 88	(1)	DCAA Report 4511-8 B179009	(N)-DCAA
8 May 89	(1)	DCAA Form 1, Notice 002	(N)
(undated)	(2)	AFAA Report 86-5 (Unclassified Version)	AFAA
16 Oct 86	(2)	DCAA Report 4511-7B486004	AFAA
2 Jun 87	(2)	DCAA Report 4511-7B486004S1	HUGHES (H)-AFPRO
	(3)	30 July 86 AFPRO/HAC Meeting [so far a DPRO search has not resulted in such a document being found on record]	
15 Jun 84	(4)	Northrop Request for Audit	(N)-ACO
4 Feb 88	(5)	HAC "Statement of Claim Re Suspension of Gate Array Radar Development Costs Under Subcontract MPO 3NS-290450-AR," including all supplemental claims by HAC and actions thereon by the Government. [so far a DPRO search has not resulted in such a document being found on record]	

HUGHES
RADAR SYSTEMS GROUP

05 April 1991

Defense Logistics Agency
Defense Contract Management Command
Defense Plant Representative Office
Hughes Los Angeles
P. O. Box 92463
Los Angeles, California 90009-2463

Re: DCMDW-RKA
Subject: Freedom of Information Act (FOIA) Request
Attention: Thomas E. Woolpert
Capt., USAF
Contracting Officer

Thank you for your messages, dated 25 and 27 March 1991, and enclosures of documents for Hughes Aircraft Company's review concerning Pace, Quinn and Rose's request under FOIA for documents and information pertaining to B-2, F-14, F-15 and F-18 subcontracts awarded to Hughes.

We have reviewed these materials and conclude that they must be provided to Pace, Quinn and Rose in any event under a discovery request in the U.S. Distirct Court for the Central District of California in the case of *Schumer v. Hughes*, Civil Action CV 89-390 MRP (Bx), C.D. Cal. However, a protective order has been issued by the court enabling Hughes to appropriately identify data it considers proprietary. Accordingly, Hughes has stamped and is returning herewith the documents so marked for your submittal.

Sincerely,

HUGHES AIRCRAFT COMPANY

Radar Systems Group

/s/ John F. Wilson
JOHN F. WILSON
Director of Contracts

DEFENSE LOGISTICS AGENCY
DEFENSE PLANT REPRESENTATIVE OFFICE
HUGHES LOS ANGELES
P.O. BOX 92463
LOS ANGELES CALIFORNIA 90009-2463

RKEE Nov 06 1991

SUBJECT: Technical Review of the HAC/D, Lynch Briefing of 18 Oct 91 for Capt Vance, Lt Barchick, and B. Reilly

TO: RKA (Mr B. Reilly)

1. In response to your request, RKEE has completed a technical review of the subject briefing. Due to the limited time frame allocated for this task, RKEE concentrated on validating the most important points of the briefing. This was accomplished by reviewing as many pertinent documents as possible (see Encl 1).

2. A review of the previous Det 36/EPE Hardware Commonality Report, dated 30 September 1986, revealed the following:

a. A limited number of documents were reviewed (13 each), 6 of which were purchase orders.

b. The only technical document reviewed was the Critical Item Development (CID) Specification for the B-2 radar. It is our belief that this Hardware Commonality Report was based on insufficient technical and associated data which could easily have resulted in the evaluator drawing the wrong conclusion.

3. Our investigation supports the information presented in the briefing given by Mr David Lynch on 18 October 1991. The Analog Signal Converter (ASC) initial design effort using gate array technology was started on the B-2 Program in

March of 1982 to meet technical requirements of the B-2 radar. In June 1982, a MOA was signed by the B-2 & F-15 Program Managers to allocate costs of the development and fabrication of this ASC. But it was not until January 1984 that MACAIR approved a contract modification (RCP/CCP M0001 dated 4/23/83) to utilize the advanced ASC in the F-15 MISIP radar.

4. The Advanced Radar Data Processor (RDP) was designed for the F-15 MISIP radar and the F-15 program funded all development efforts for the basic design. In December 1982, the Program Managers of the F-15 and B-2 radar programs signed a MOA for the allocation of costs of development and fabrication tasks for the RDP. In February 1983, Northrup concurred with the Hughes proposal to use the F-15 RDP in the B-2 radar.

5. To summarize the above:

a. The ASC using gate array technology design was started on the B-2 radar program and was later used on the F-15 MISIP radar program with costs being allocated in accordance with a MOA between the B-2 and F-15 program offices.

b. The F-15 MISIP RDP design was funded by Hughes and the F-15 MISIP radar program and then used on the B-2 radar with costs being allocated in accordance with a MOA between the B-2 and F-15 program offices.

6. All documentation supporting this technical report is on file in Building R31. If you have any questions concerning this report please contact Mr John J. Boles at 414-6619.

/s/ D.A. Erickson
1 Encl DONALD A. ERICKSON
Chief Systems Engineering Branch

(attachment omitted)

DEFENSE CONTRACT AUDIT AGENCY
SOUTHWESTERN REGION
Corporate Resident Office
Hughes Aircraft Company
200 N. Sepulveda Blvd. (SC/864/C130)
El Segundo, CA 90245-2463

4511/JLM/flm 14 November 1991

MEMORANDUM TO DIVISIONAL ADMINISTRATIVE
CONTRACTING OFFICER, DPRO,
HUGHES LOS ANGELES

SUBJECT: Determination of B-2 Commonality Issue

In response to your letter DCMDW-RKA, dated 6 November 1991, we are presenting our conclusions and recommendation on the B-2 Commonality Issue.

We concur with the contractor's claim for reimbursement of costs incurred for the design, development, fabrication assembly, and testing of modules and components incorporated into the Analog Signal Converter and Radar Data Processor units for the B-2 radar system. Our original recommendations for cost suspensions resulted from the Air Force Audit Agency findings that development costs charged to the Hughes' three major programs: F-15 MSIP, F14D, and B-2, should have been borne by the F-15 MSIP only.

Based on the original facts presented to DCAA during the 1985/1986 timeframe we believe they made the correct determination. Because the classified nature of the B-2 program precluded Hughes from discussing any aspect of the B-2 program with any other Hughes' customers or Air Force program office personnel not cleared on B-2, this prevented Hughes from disclosing full details regarding commonality in its pricing on the F-15 MSIP and F-14D programs. Later, the

Air Force authorized Hughes to disclose certain information without violating B-2 security requirements. Additionally as information has periodically become available these commonality ambiguities have been resolved or are in the process of resolution.

Our review of the currently available information has shown that the Hughes' gate array enhanced ASC became a requirement on the B-2 subcontract and was being worked on before the F-15 MSIP subcontract authorized funding for that effort. Also the cost allocation system adopted pursuant to Hughes' internal commonality agreements was disclosed to both Northrop and the Air Force. Therefore, the contractor's claim for reimbursement of costs incurred on the B-2 radar contract is valid.

If you have any questions please call me at (310) 364-8500.

/s/ Jeffrey L. McGowan
JEFFREY L. MCGOWAN
Resident Auditor

DEFENSE LOGISTICS AGENCY
DEFENSE CONTRACT MANAGEMENT COMMAND
DEFENSE PLANT REPRESENTATIVE OFFICE
HUGHES LOS ANGELES
P.O. BOX 92463
LOS ANGELES, CALIFORNIA 90009-2463

DCMDW-RKA 14 Nov 91

SUBJECT: Release of Suspended B-2 Radar Development Costs

TO: DPRO Northrop
ATTN: Everett Parker, DACO
DCMDW-RXA

1. References:

a. DPRO Hughes-LA Technical Review, dated 6 Nov 91

b. DPRO Hughes-LA letter dated 20 Aug 90, subject: Request for Release of Withhold

c. AFPRO Hughes/TM letter dated 18 Jan 89, subject: Suspension of Payment

d. AFPRO Hughes/TM letter dated 11 Aug 87, subject: Suspension of Payment

2. It is recommended that the B-2 radar development costs suspended in response to the above referenced letters be released. The contractor has substantiated that the requirement for the gate array upgraded Analog Signal Converter existed on the B-2 program *prior* to the award of the F-15 MSIP contract. The B-2 program would have borne all costs for the development of the Analog Signal Converter if the MSIP contract had not been received. In light of the benefits received, allocation of Analog Signal Converter development costs to the B-2 program is considered appropriate. It is

recommended that the suspended costs be released with the following caveats. First, the Government does not waive rights to a share in any settlement resulting from the parallel qui tam action in the event the relator's case is successful. Second, that an associated issue of Cost Accounting Standards non-compliance is still open and shall remain so until resolved to Government satisfaction.

/s/ Brain F. Reilly
BRIAN F. REILLY, Divisional Administrative Contracting Officer

cc: DLA/M. Stein
DCAA/J. McGowan

2 Encl
1. DPRO Technical Report
2. DCAA Memorandum

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA EX REL WILLIAM J. SCHUMER,	)
PLAINTIFF,	)
VS.	) NO. CV89-0390 MRP
HUGHES AIRCRAFT COMPANY,	)
DEFENDANT.	)

DEPOSITION OF ROBERT CHARLES DAVIS
DECEMBER 10, 1991

REPORTED BY: RUTH C. MOORE, CSR NO. 8444, RPR

JOB NO. 91655

SCHUMACHER SHORTHAND REPORTING CORPORATION
2100 SAWTELLE, SUITE 103, LOS ANGELES, CA. 90025
(301) 478-3977

* * * *

Q. ON PAGE 2, THE LAST SENTENCE ON PAGE 2 SAYS "WHEN REQUESTED, NO COMMONALITY PLANS WERE AVAILABLE FROM HUGHES." THE REFERENCE THERE IS TO HUGHES.

IS THAT RIGHT? 118-A?

A. THAT IS CORRECT.

Q. IT SAYS THAT NO COMMONALITY PLANS WERE AVAILABLE FROM HUGHES.

WHAT IS YOUR UNDERSTANDING OF WHAT THAT'S REFERRING TO?

A. I BELIEVE WHAT THAT'S REFERRING TO IS DETAILED IMPLEMENTATION PLANS OF THE COMMONALITY IMPLEMENTATION.

Q. WOULD THAT INCLUDE THE COMMONALITY AGREEMENTS THEMSELVES? IS THIS SENTENCE SAYING THAT THE COMMONALITY AGREEMENTS WERE NOT AVAILABLE FROM HUGHES?

A. I DO NOT BELIEVE THAT'S WHAT IT'S SAYING.

Q. THERE ARE TWO ITEMS THAT ARE DISCUSSED IN THIS DOCUMENT RELATING TO INDICATED FINAL COST EXERCISES OR IFC EXERCISES. THERE'S A MAY 1984 IFC AND A MAY 1985 IFC.

DO YOU SEE THOSE REFERENCES?

A. YES, I DO.

Q. IN THE PARAGRAPH ON PAGE 2, THE PARAGRAPH AT THE BOTTOM, IT USES THE TERM UNAUTHORIZED GROWTH, OR IT'S, I BELIEVE, REFERRING TO UNAUTHORIZED COST GROWTH.

IS THAT WHAT IT'S REFERRING TO WHEN IT SAYS "UNAUTHORIZED GROWTH"?

A. YES, IT IS.

Q. WHAT IS YOUR UNDERSTANDING OF THE MEANING OF THAT TERM "UNAUTHORIZED GROWTH"?

A. MY UNDERSTANDING OF THAT IS THAT SINCE THE RADAR WAS BEING PROCURED ON A COST PLUS CONTRACT, ALL COSTS ASSOCIATED WITH THAT CONTRACT ARE CHARGED TO THE CUSTOMER, MEANING NORTHROP, AND DON'T HAVE TO BE A PART OF A CHANGE THAT IS DIRECTED OR AUTHORIZED BY NORTHROP. THEREFORE, THESE COSTS WERE COSTS THAT WERE ASSOCIATED WITH DEVELOPING THE ALREADY EXISTING AUTHORIZED WORK.

MR. BENSON: COULD YOU READ THAT RESPONSE BACK AGAIN, PLEASE.

(WHEREUPON, THE ANSWER WAS READ BY THE REPORTER AS FOLLOWS: "MY UNDERSTANDING OF THAT IS THAT SINCE THE RADAR WAS BEING PROCURED ON A COST PLUS CONTRACT, ALL COSTS ASSOCIATED WITH THAT CONTRACT ARE CHARGED TO THE CUSTOMER, MEANING NORTHROP, AND DON'T HAVE TO BE A PART OF A CHANGE THAT IS DIRECTED OR AUTHORIZED BY NORTHROP. THEREFORE, THESE COSTS WERE COSTS THAT WERE ASSOCIATED WITH DEVELOPING THE ALREADY EXISTING AUTHORIZED WORK.")

Q. BY MR. TROY: NOW, DO YOU BELIEVE THAT THE STATEMENTS ABOUT UNAUTHORIZED COST GROWTH INDICATED A CONCERN THAT COSTS WERE BEING CHARGED TO THE B-2 THAT WERE NOT ALLOWABLE?

A. NO.

Q. IN FACT, THE PRIMARY CONCERN THAT NORTHROP HAD AT THIS TIME WAS NOT WHETHER THE COSTS WERE ALLOWABLE ON THE B-2 BUT, RATHER, A CONCERN ON COST GROWTH IN GENERAL.

ISN'T THAT CORRECT?

A. THAT IS CORRECT.

Q. AND PART OF NORTHROP'S CONCERN OVER COST GROWTH WAS THE LACK OF VISIBILITY AS TO HOW THESE COSTS WERE BEING MANAGED.

IS THAT CORRECT?

A. THAT IS CORRECT.

Q. LATER ON IN 1986 AND THEREAFTER, AIR FORCE AUDITORS REVIEWED SOME OF THE ISSUES THAT ARE DESCRIBED IN THE WHITE PAPERS.

WERE YOU AWARE OF THAT AUDIT?

A. YES, I WAS.

* * * *

(caption omitted in printing)

DEPOSITION OF BRIAN FRANCIS REILLY
DECEMBER 17, 1991

* * * *

Q. ARE YOU FAMILIAR WITH THE ISSUE ON THE B-2 PROGRAM RELATING TO A FORM 1 DISALLOWANCE IN THE AMOUNT OF APPROXIMATELY $15 MILLION THAT RELATES TO COSTS ASSOCIATED WITH WHAT'S CALLED THE ASC GATE ARRAY DEVELOPMENT EFFORT?

A. YES, SIR.

Q. DID YOU BECOME FAMILIAR WITH THAT IN YOUR CAPACITY AS THE CHIEF OF THE CONTRACT MANAGEMENT DIVISION?

A. YES, SIR.

* * * *

Q. DO YOU KNOW WHETHER THERE ARE ANY ONGOING NEGOTIATIONS BETWEEN HUGHES AND THE GOVERNMENT RELATED TO OBTAINING OR REACHING AN ADMINISTRATIVE SETTLEMENT OF ANY CAS VIOLATION RELATED CLAIMS?

MR. GALLAGHER: OBJECTION. IT'S A VAGUE AND AMBIGUOUS QUESTION UNLESS IT'S RELATED SPECIFICALLY TO WHAT'S INVOLVED IN THIS LITIGATION.

MR. BENSON: BUT IT IS.

MR. GALLAGHER: WELL, THERE'S ALL KINDS OF POSSIBLE CAS ISSUES. ARE YOU TALKING ABOUT THE ONE IN THIS LITIGATION?

MR. BENSON: RELATED TO THIS LITIGATION.

Q. IF THERE ARE ANY SETTLEMENT NEGOTIATIONS BETWEEN THE GOVERNMENT AND HUGHES PERTAINING TO ANY CAS-RELATED VIOLATIONS?

A. AS I UNDERSTAND IT, THE ONLY RELATED COST ACCOUNTING STANDARDS ISSUE OPEN AT THIS TIME IS THE ONE REFERRED TO IN MY LETTER TO MR. PARKER. WE ARE WORKING, AS WE DO WITH ALL ADMINISTRATIVE ISSUES, TO RESOLVE THE ISSUE WITH THE COMPANY. THIS IS THE INFORMATION THAT WAS PROVIDED BY MR. LYNCH IN THE TECHNICAL REVIEW REFERRED TO IN THE TECHNICAL REPORT PROVIDING INFORMATION THAT SUPPORTED THE RESOLUTION OF THE COST ACCOUNTING STANDARDS ISSUE, AND THERE'S BEEN SUBSEQUENT MEETINGS ON THE RESOLUTION OF THE COST ACCOUNTING ISSUE.

* * * *

(WHEREUPON THE QUESTION WAS READ BY THE REPORTER AS FOLLOWS: "PRIOR TO THE AMENDMENT IN 1984, ARE YOU AWARE OF A COST ACCOUNTING DISCLOSURE STATEMENT FROM HUGHES APPLICABLE TO THE F-15 MSIP OR THE B-2 FSD WHICH SUGGESTED THE POOLING OF COSTS RELATED TO DIRECT LABOR?")

THE WITNESS: THE FIRST PART OF IT IS COST. THE COST ACCOUNTING STANDARDS DISCLOSURE STATEMENTS ARE APPLICABLE TO ALL NEGOTIATED CONTRACTS OVER A CERTAIN THRESHOLD.

Q. BY MR. BENSON: IS IT YOUR UNDERSTANDING THAT THE B-2 FSD AND THE F-15 MSIPS EXCEEDED THAT THRESHOLD?

A. YES, IT IS.

Q. WHAT'S THE REST OF YOUR RESPONSE?

A. WHAT I'M AWARE, FROM THE REVIEW THAT THE DPRO CONDUCTED, WAS WHAT WE FOUND WAS THAT, PRIOR TO THE DISCLOSURE IN 1984, THE AMENDMENT IN 1984, THAT THE DISCLOSURE STATEMENT SUBMITTED DID NOT SPECIFICALLY ADDRESS THE ALLOCATION OF DEVELOPMENT COSTS.

Q. INTO DIRECT LABOR POOLS?

A. WELL, INTO -- I WOULD PHRASE IT DIFFERENTLY. I WOULD SAY THE ALLOCATION -- IT WAS SILENT AS FAR AS ALLOCATION OF THE DIRECT LABOR -- OF DEVELOPMENT COSTS FOR DIRECT LABOR.

* * * *

Q. DO YOU KNOW IF, IN RETURNING THIS MONEY TO HUGHES, THESE WERE PART OF THE CONSIDERATIONS: WHETHER OR NOT THE CAS STANDARDS INCORPORATED WHAT IT WAS, WHETHER THEY FOLLOWED IT, WHETHER THEY CERTIFIED TO IT WHEN THEY ASKED NORTHROP OR THE GOVERNMENT TO GIVE THEM THE BIG BUCKS THAT THEY THOUGHT THEY WERE ENTITLED TO?

MR. GALLAGHER: OBJECTION. VAGUE QUESTION.

THE WITNESS: PRIOR TO THE SIGNATURE ON EXHIBIT 75 AUTHORIZING A RELEASE AND RECOMMENDING THE RELEASE OF THOSE SUSPENDED COSTS, THE GOVERNMENT TOOK INTO CONSIDERATION THE BASIS FOR THE SUSPENSION, WHICH WAS SPECIFICALLY ANALOG SIGNAL CONVERTER COSTS, AND LOOKED AT THE ISSUE FROM BOTH A TECHNICAL AND ACCOUNTING

PERSPECTIVE AND CAME TO THE CONCLUSION THAT THERE WAS NOT A BASIS FOR CONTINUING THE SUSPENSION.

Q. BY MR. BENSON: THEY CAME TO THE CONCLUSION THAT THERE HAD NOT BEEN A VIOLATION OF THE CAS DISCLOSURE STATEMENT?

A. THEY CAME TO THE CONCLUSION THAT THERE WAS NOT A BASIS FOR CONTINUING THE SUSPENSION.

Q. BUT THEY DID NOT COME TO A CONCLUSION WHETHER OR NOT THERE WAS A VIOLATION OF THE CAS DISCLOSURE REQUIREMENT? THE CAS REQUIREMENTS OR DISCLOSURE CLAUSES INCORPORATED IN THE APPLICABLE CONTRACTS, THAT WAS NOT RESOLVED.

CORRECT?

A. WHAT WE TOOK INTO CONSIDERATION ON THE COSTS INVOLVED WAS: WAS THE DISCLOSURE A TECHNICAL NONCOMPLIANCE REGARDING THAT THE DISCLOSURE STATEMENT AMENDMENT DID NOT ADDRESS THIS AND HOW WAS THE CONTRACTOR'S PROPOSAL PREPARED, WHAT INFORMATION WAS DISCLOSED TO THE GOVERNMENT THROUGH THE PROPOSAL IN THE NEGOTIATION PROCESS. AND THAT WAS TAKEN INTO CONSIDERATION PRIOR TO RELEASE OF THE SUSPENSION.

Herbert Hafif, Bar No. 27311
Phillip E. Benson, Bar No. 097420
Jesse L. Young, Bar No. 123763
Linda R. MacLean, Bar No. 101002
Greg Hafif, Bar No. 149515
LAW OFFICES OF HERBERT HAFIF
269 West Bonita Avenue
Claremont, California 91711
(714) 624-1671

Attorneys for *Qui Tam* Plaintiff
WILLIAM J. SCHUMER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex. rel., WILLIAM J. SCHUMER,	)Case No. CV 89-0390 MRP (Bx)
	)*QUI TAM*
Plaintiff,	)PLAINTIFF'S SEPARATE STATEMENT OF MATERIAL FACTS IN OPPOSITION TO DEFENDANT, HUGHES AIRCRAFT COMPANY'S MOTION FOR SUMMARY JUDGMENT
v.	
HUGHES AIRCRAFT COMPANY,	
Defendants.	)DATE: March 9, 1992
	)TIME: 10:00 a.m.
	)COURTROOM:
	)Hon. Mariana R. Pfaelzer

* * * *

Defendant's "Uncontroverted Fact" No. 5:

On April 13, 1978, Hughes submitted to the Air Force Plant Representative Office ("AFPRO") and the Defense Contract Audit Agency ("DCAA") an amendment to Hughes' Cost Accounting Standards ("CAS") Disclosure Statement for the Radar Systems Group Manufacturing Division, dated April 4, 1978. The amended Disclosure Statement described Hughes' Commonality accounting methodology:

> Direct labor cost incurred in the manufacture of common hardware is collected in a holding account and is allocated to contracts based on requirements times standards.

Plaintiff's Response to "Uncontroverted Fact" No. 5:

Controverted in part.

Plaintiff's Separate Statement of Material Facts:

Defendant's Exhibit 21 reveals the following:

(a) The reporting unit for the disclosure statement was Hughes' Radar Systems Group ("RSG") Manufacturing Division. Because no other reporting unit is listed, pursuant to CAS 202-1, (FAR 30.202-1) the only segment of Hughes to which the disclosure statement applied was the RSG Manufacturing Division, not the entire Hughes Corporation as suggested by the Defendant. Prior to 1984, RSG had three separate disclosure statements for three separate reporting units: Group Office, Non-Manufacturing Division and Manufacturing Division. There was no provision for the allocation of *development* costs between contracts in the non-manufacturing division disclosure statement. See Plaintiff's Exhibit 2 (DLA letter "Reilly", dated 9/19/90).

(b) The portion of the disclosure statement relating to "added accounting treatment of common direct material" is curiously omitted from the Defendant's Exhibit 21 and is, therefore, filed concurrently herewith as *qui tam* Plaintiff's

Exhibit 3. *Qui tam* Plaintiff's Exhibit 2 sets forth that portion of the omitted disclosure statement that clearly tracks the note at the bottom of Defendant's Exhibit 21 requiring the submission of a revised CAS Disclosure Statement in order to establish a "company-owned *inventory* (holding) account by RSG Manufacturing Division". That statement, under "Item No. 2.3.0(Y)(2) states that "Direct material cost incurred in the manufacture of common hardware is collected in a *holding account* and allocated to contracts based on *requirements*.

(c) The reference to "requirements" under Item No. 2.3(Y)(2) (*qui tam* Plaintiff's Exhibit 2) tracks item no. 2.5.0(Y)(4) in Defendant's Exhibit 21. Item no. 2.5.0(Y)(4) references the collection of direct labor costs incurred in the manufacture of common hardware in holding accounts and allocated to contracts based on "Requirements times standards".

(d) The reference to "requirements" and "requirement times standards" suggests that Defendant's Exhibit 21 applies to the accounting and cost accumulation practices associated with requirements contracts, although this is unclear given the dearth of foundational information provided by the Defendant, including the original disclosure statement amended by Defendant's Exhibit 21 and the remaining portions of the disclosure statement and amendments. Requirements contracts are specifically addressed in the FAR at section 16.503 and are separate and distinct from the types of contracts at issue in this case.

(e) The cover letter to Defendant's Exhibit 21 indicates that the amended disclosure statement was applicable to RSG's *manufacturing* efforts incurred on the Programmable Signal Processor containing common material. Further, Item No. 2.5.0 (Y)(4) pertaining to the allocation of direct costs is limited to the *manufacture of common hardware*. Common hardware in the defense community or standardized hardware, is controlled by the Secretary of Defense, pursuant to 10 U.S.C. Section 2451 et seq., through the development and

maintenance of a single catalog system listing the kinds of items that may be procured for recurrent use, identifying such items with performance data, eliminating overlapping and duplicate specifications and reducing the number of sizes and kinds of items that are generally similar.

Defendant's "Uncontroverted Fact" No. 6:

Hughes' CAS Disclosure Statement is a written description of Hughes' cost accounting practices and procedures. Prior to the award of a Government contract, the Government's Administrative Contracting Officer is responsible for reviewing the contractor's Disclosure Statement for adequacy and compliance.

Plaintiff's Response to "Uncontroverted Fact" No. 6:

Controverted in part.

Plaintiff's Separate Statement of Material Facts:

In addition to reviewing the CAS Disclosure Statement for both adequacy and compliance (see FAR 30.202-7), the Administrative Contracting Officer is required to notify the contractor in the notice of adequacy that a disclosed practice shall not, by virtue of such disclosure, be considered an approved practice for pricing proposals or accumulating and reporting contract performance cost data.

The disclosure of a cost accounting practice by a contractor does not determine the allow ability of particular items of cost, nor are disclosed practices deemed to have been approved by the contracting Agency as proper, approved, or agreed-upon practices for pricing proposals or for accumulating and reporting contract performance cost data. (See FAR 30.303).

The Government Administrative Contracting Officer responsible for determining the adequacy and compliance of a subcontractor's CAS Disclosure Statement is generally the ACO having cognizance of the prime contractor unless the subcontractor considers the disclosure statement privileged or

confidential in which case the subcontractor may submit it directly to the Government ACO and auditor cognizant of the subcontractor. The ACO cognizant of the subcontractor shall then make a recommendation to the ACO cognizant of the prime contractor. However, disclosure statements submitted by a subcontractor post-award must be approved by the ACO having cognizance of the prime contractor. If a pre-award disclosure statement is submitted to the ACO having cognizance of the subcontractor, a pre-award determination of adequacy is not required. Instead, the ACO cognizant of the subcontractor shall (i) notify the auditor that the adequacy review will be performed during the post-award compliance review and, upon completion (ii) notify the subcontractor, the contractor and the cognizant ACO's of the findings. (FAR 30.202-8) Compliance reviews, according to regulation, follow completion of the adequacy determination. (FAR 30.202-7). The auditor's post-award advisory compliance review, in conjunction with the ACO, does not relieve the contractor of responsibility for non-compliance should the auditor fail to detect a non-compliance. See *PACCAR Inc.* (ASBCA 1989) No. 27978, 89-1 BCA, Paragraph 21,696.

Defendant's "Uncontroverted Fact" No. 7:

Hughes' April 13, 1978 amendment to its Disclosure Statement was approved by the cognizant Government official.

Plaintiff's Response to "Uncontroverted Fact" No. 7:

Controverted.

Plaintiff's Separate Statement of Material Facts:

The Defendant bases this contention on the Declaration of Allen E. Brunmier, at Defendant's Exhibit 2, Paragraph 4. Brunmier, in 1978, appears to have been a cognizant ACO for Hughes, the subcontractor on the Programmable Signal Processor for the existing F-14, F-15 and F-18 production contracts. (See Defendant's Exhibit 20.) At Paragraph 4 of his declaration, Brunmier states that the PACO (Principal Administrative Contracting Officer) approved Hughes' April

4, 1978, Disclosure Statement based on his (Brunmier's) recommendation. Brunmier does not indicate whether the cognizant auditor performed a review of the Disclosure Statement or whether any auditor performed the required post-award compliance review, thereafter advising the ACO of the results, or the name of the approving PACO. In fact, it appears that the PACO who determined the adequacy of the post-award Disclosure Statement was Evan R. Brossman. (See Defendant's Exhibit 21, Page 304, and *Qui Tam* Plaintiff's Exhibit 4 (Brossman letter dated 26 March 1979 w/attachments).) The Defendant has provided no information indicating that the approving PACO was other than Brossman. Brossman, at the time, was the Principal Administrative Contracting Officer for Hughes, the subcontractor. There is no evidence that any ACO for the prime contractors on the F-18 (McDonnell Douglas), F-15 (McDonnell Douglas), and F-14 (Grumman) projects approved Hughes' Disclosure Statement. Therefore, the "cognizant Government official" may not have approved Hughes' April 4, 1978 amendment to its Disclosure Statement. Curiously, the declaration of Hughes' RSG Group controller at that time, Joseph Rohlinger (Defendant's Exhibit 1), omits reference to either the approval of the Disclosure Statement and, like Brunmier's Declaration, any reference to the identity of the cognizant approving ACO, although Rohlinger claims to have personally approved the so-called 24 March 1978 "Commonality Agreement" giving rise, according to the Defendant, to the 4 April 1978 Disclosure Statement. (See Defendant's Exhibit 1 at Paragraph 4 and Defendant's Exhibit 20.)

* * * *

Defendant's "Uncontroverted Fact" No.16:

Hughes' technical proposal for the B-2 radar described conceptual approaches to meet the Air Force's performance specifications. The proposal did not represent a promise by Hughes to build the radar according to the configurations described in the proposal. It was understood by Hughes,

Northrop and the Air Force that the design of the radar was entirely the prerogative and responsibility of Hughes; that design was required only to achieve the performance requirements of the subcontract within the size and weight constraints specified.

Plaintiff's Response to "Uncontroverted Fact" No. 16:

Controverted in part.

Plaintiff's Separate Statement of Material Facts:

Hughes had *proposed* equipment that it felt would meet the requirements of the definitized specification. That hardware configuration had not yet been agreed upon formally through the design review process *that is required* of a Government contract. Davis Deposition, Plaintiff's Exhibit 10, p. 9:20-25. Although the Defendant claims it had some flexibility in the design approach submitted in its proposal, this approach was subject to customer approval in the award and contracting process. For example, Northrop, the prime B-2 contractor, refused to accept Hughes' initial proposal after award, but before contract definitization, to use the F-15 Radar Data Processor ("RDP") because "it was not a sure thing."

Subsequent to contract definitization in October 1982, Hughes convinced Northrop and the Air Force to accept the RDP on the basis that the F-15 customer of Hughes would fund the development of the RDP. Davis Deposition, Plaintiff's Exhibit 10, p.10:1-14:17. Tucker Deposition, Plaintiff's Exhibit 6, p. 45:9-16. Because of this representation that the F-15 customer would fund the development costs for the RDP, the Defendant was able to avoid the provisions of its definitized agreement with Northrop requiring the submission of a "change proposal" including a DD Form 633 for the submission of any change proposal involving a cost of $500,000 or greater. See Defendant's Exhibit 27, p.347. The Defendant's formal contract proposal, however, was required to be submitted with a certificate of current cost and pricing data. See Truth in Negotiations Act ("TINA"), former section

10 U.S.C. Section 2306(F)(1)(c) (amended July 18, 1984). Such cost or pricing data enables the Government to perform cost or price analysis and enables the Government and the contractor or negotiate fair and reasonable prices. See FAR 15.804.1. "Cost or Pricing data" means all facts as of the date of the price agreement that prudent buyers and sellers would reasonably expect to effect price negotiations significantly, including vendor quotations and make or buy decisions. See FAR 15.801. Of similar significance is an offeror's possession of a current inventory of parts that could be used in performance. (See *Hardie-Tynes Mfg. Co.* (ABSCA 1976) Nos. 20367, 20387, 76-1 BCA Paragraph 11,827.)

The Defendant's cost estimates in its proposal, therefore, required it to submit estimates based on accurate and current projections of costs related to the material and labor associated with building a radar according to the configuration described in the proposal and the performance requirements of the subcontract. Any subsequent modifications of the contract involving cost impact different from that initially estimated would also be subject to the provisions of TINA. See Giacoletto Deposition, Plaintiff's Exhibit 12, pp.54:4-64:24. There I no evidence, however, that such a "modification" certificate, relevant to the allegations in this case was ever submitted.

The actual price proposal submitted by the Defendant, in fact, lists specific estimates for the cost of hardware related to the B-2 FSD Program, Plaintiff's Exhibit 13. The proposal stated that the prices presented "represented the total program as revised by... the added program hardware." The price for hardware was listed as a specific line items, in addition to systems engineering and manufacturing, to the dollar. The tasks, related to direct labor and material cost, were equally broken down by line items to the dollar. Under "limited production pieces", the following "assumption" was made: "Prices reflect the configuration described in the June 1982 program meeting." In the "Hardware Quantity Change" por-

tion of the proposal, each of the configuration units and the quantity of each is set forth showing an increase in price from the earlier BAFO ("Best and Final Offer") based on quantity. A comparison of the earlier BAFO price estimates and the later formal proposal estimates per Work Breakdown Structure (WBS) shows at WBS "C" "Hardware" no change in the cost of hardware "design". The only cost pool stated is for "overhead pools", an indirect cost, as opposed to direct cost estimates for labor and material which shows no proposed direct cost pool.

In addition to the cost breakdown in the formal proposal, DD form 633's were attached. Plaintiff's Exhibit 14. DD form 633 are standardized Government forms required to be submitted with formal proposals. The DD form 633's attached to the proposal and signed by J. R. Rohlinger for Hughes Radar Systems Group represented the following:

> 1. that the proposal was consistent with the Defendant's established estimating and accounting practices and procedures and DAR XV cost principles;
>
> 2. that the procurement action was consistent with CASB ("Cost Accounting Standards Board") regulations;
>
> 3. that the Defendant had submitted a CASB disclosure statement;
>
> 4. that no aspect of the proposal was inconsistent with the Defendant's disclosed practices or applicable cost accounting standards.
>
> * * * *

Defendant's "Uncontroverted Fact" No. 139:

The Government has never raised any question regarding whether Hughes allocated the shared costs in accordance with the terms of the commonality agreements.

Plaintiff's Response to "Uncontroverted Fact No. 139:

Controverted.

Plaintiff's Separate Statement of Material Facts:

The Government has clearly raised questions since 1985 with regard to Hughes' accounting practices in accordance with its Commonality Agreements. While the Government may not have directed its concern to whether or not Hughes violated its own internal cost pooling scheme, is irrelevant. The fact that the Government reviewed charges, found millions of dollars in overcharges, reviewed the agreements, and reviewed results of those agreements that were made available by Hughes, certainly indicates that the Government questioned the compliance of these activities with applicable regulations.

The Defendant is attempting here to close the loop of its scheme to defraud the Government, and ask the Court to join on a final, last-ditch leap of faith to the conclusion that the "Commonality Agreements" are some for of legitimate document, wherein Hughes unilaterally authorized itself to commingle costs and submit claims for those costs to whichever customers, and whichever amounts or percentage allocations it deemed appropriate.

ACO Reilly, in his deposition, testified that he had found that prior to the amendment of the Defendant's CAS Disclosure Statement in 1984, the Disclosure Statement submitted did not address the allocation of development costs. Mr. Reilly testified that the CAS 401 disclosure submitted by Hughes was still being reviewed for compliance by the Department of Defense as it related to the manner in which Hughes had priced and charged its contracts at the time that he released the withheld funds.

Based on the self described limited reviews of the DLA and DCAA, ACO Reilly mistakenly made this leap, but continues to hold on to the rope he tied to the potential for the Government's recovery in this False Claims lawsuit - "First,

the Government does not waive rights to a share in any settlement resulting from the parallel *qui tam* action in the event the realtors' case is successful" as stated in Reilly's November 14, 1991, letter to release the suspended B-2 radar development costs. (See *supra;* Reilly Deposition, Page 42:24 through Page 43:08).

DATED: January 6, 1992

LAW OFFICES OF HERBERT HAFIF

By: /s/ P. Benson
PHILIP E. BENSON
Attorneys for *Qui Tam* Plaintiff
WILLIAM J. SCHUMER

DECLARATION OF DUDLEY SLATER IN SUPPORT OF HUGHES' MOTION TO DISMISS PURSUANT TO F.R.C.P. 12(b) (1) and 12(h) (3)

I, Dudley Slater, declare and say:

1. Between 1966 and 1988, I was employed by the Defense Contract Audit Agency ("DCAA") an agency of the United States Government. In 1973, I was a DCAA auditor at Hughes Aircraft Company's ("Hughes"), Culver City, California location which, at that time, was Hughes' corporate office. During this time, I was a supervisory auditor and had responsibility to oversee, among other things, different pricing issues, operations audits, and the audit of price proposals. In 1981, I transferred from Hughes' corporate office to the Pasadena branch office of the DCAA where I became a branch manager. In August of 1983, I transferred back to Hughes' corporate office as the resident auditor until I retired in December of 1988. In that capacity, the other DCAA personnel who were assigned to Hughes reported to me. During this time, I was responsible for DCAA audits of Hughes' Radar Systems Group ("RSG"). I have personal knowledge of all of the allegations set forth herein. If called as a witness, I could and would, testify competently thereto.

2. As a former DCAA resident auditor, I am familiar with cost accounting practices and principles utilized in the defense industry. When I was the DCAA resident auditor at Hughes, I became familiar with the concept of "Commonality." "Commonality," as employed pursuant to RSG's Commonality Agreements, refers to the cost sharing among different radar programs for the development of certain radar components which are common to more than one radar program. Commonality Agreements could enable Hughes to develop and manufacture products at a reduced cost to the government. I have been aware of this cost allocation methodology practice for about seven years. Hughes' commonality

cost allocation methodology has been reviewed during the course of the audits described below and in the context of the review of Hughes' Cost Accounting Standards Disclosure Statements, also discussed below.

3. From 1984, I was aware that Hughes had utilized a "commonality arrangement" to allocate development costs among different participating programs, including the B-2, F-15 MSIP, and F-14D.

4. In late 1985 and 1986, I had knowledge that the Air Force Audit Agency conducted an audit investigation. I later learned in or about 1987 that the main issue in this audit was the charging of advanced radar equipment development costs via Commonality Agreements to the F-15 MSIP, the F-14D and the B-2 programs.

5. In response to the Air Force Audit Agency's request in March of 1986, the DCAA conducted an audit which was coordinated with the Air Force Plant Representative Office ("AFPRO") at Hughes Radar Systems Group. Included in this coordinated effort was an assessment of the validity of the government's assumption that the F-15 contract should bear the full development costs associated with Commonality, and to determine whether the Commonality Agreements were proper. The results of this Audit were reflected in the DCAA Audit Report No. 4511-7B486004.

6. Audit Report No. 4511-7B486004 reviewed costs accumulated by Hughes for the development of certain radar hardware equipment which was shared among the B-2, the F-15 MSIP, and the F-14D radar system programs. The report was not classified. These audit matters were discussed with Hughes' contract and cost accounting representatives, including Mr. Sam Balucas of Hughes. I personally reviewed and signed this audit report. A true and correct copy of this October 1986 Audit Report is attached hereto as Exhibit "A."

7. In accordance with a May 19, 1987 request, the DCAA conducted a supplemental unclassified audit to verify

the costs incurred by Hughes Radar Systems Group which were charged to its commonality pools. These charges were traced to the general ledger accounts within the F-14D, F-15 MSIP, F-18 and B-2 programs. The results of this audit were reflected in Audit Report No. 4571-7B486004S1, dated June 2, 1987 which I signed. No part of the June 2, 1987 audit report was classified. These audit matters were discussed with Mr. Sam Balucas during the course of the review. A true and correct copy of this Audit Report is attached hereto as Exhibit "B."

8. On or before September 27, 1988, I reviewed the contents of, and signed DCAA Audit Report No. 4511-8B179009. The stated purpose of the September 1988 Audit Report was to determine, among other things, whether Hughes' commonality accounting practices were part of Hughes Radar System Group's disclosed accounting practices (pursuant to cost accounting standards requirements), and to determine whether such accounting practices were "considered adequate for the allocation of common radar costs." This Audit analyzed common radar equipment cost sharing among the F-15 MSIP, F-14D, F-18 and B-2 programs. A cover letter dated November 7, 1988, from the Principal Administrative Contracting Officer to Hughes, reflects that the Audit Report was provided to Hughes personnel. The Audit matters were discussed with Hughes during the course of the Audit. A true and correct copy of this Audit Report is attached hereto as Exhibit "C."

9. On March 10, 1988, I met with Hughes personnel pursuant to the DCAA's review relating to the charging of radar costs via Commonality Agreements. This meeting related to the same subject matter of the prior audits set forth above. At this meeting, the details of the DCAA's concerns regarding the cost allocation of work on the F-14D, F-15 MSIP, F-18 and B-2 with respect to common radar equipment were discussed with Hughes' personnel in order to discover

whether the DCAA Form 1 cost disallowance in the amount of $11.6 Million was supportable.

10. On March 22, 1988, the DCAA, AFPRO, and Hughes had another meeting pursuant to the government's ongoing audit regarding Hughes' use of Commonality Agreements to allocate the costs of certain radar equipment. I was present at this meeting.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 21 day of January, 1992, at Salem Oregon.

/s/ Dudley P. Slater
Dudley P. Slater

DECLARATION OF JOSEPH ROHLINGER
IN SUPPORT OF HUGHES' MOTION TO DISMISS
PURSUANT TO F.R.C.P. 12(b) (1) AND 12 (h) (3)

I, Joseph Rohlinger, declare and say:

1. I was employed by Hughes Aircraft Company ("Hughes") between 1951 and October 1, 1989. From 1976 to 1984, I held the position of Group Controller of Radar Systems Group ("RSG"). From 1984 to 1987, I held the position of Vice President and Controller for RSG. In 1987, I was promoted to Vice President of Finance for RSG. I have personal knowledge of the facts contained herein and if called as a witness, I could and would testify cometently thereto.

2. I have knowledge of Hughes RSG's use of "Commonality Agreements." Pursuant to such Commonality Agreements, Hughes established cost pools both to collect the costs associated with the common tasks, and to allocate those pooled costs equitably to the benefiting contracts. Such contracts have deliverable products, i.e., radar systems, which utilize one or more of the common parts. Hughes' first Commonality cost pool was established and disclosed to the government in 1978 to allocate common hardware costs among the F-14, F-15 and F-18 contracts. Pooling began on the B-2 in the latter part of 1983.

3. In October or November of 1986, the government disclosed to Hughes' personnel a copy of Audit Report No. 4511-7B486004, dated October 16, 1986. This audit report was not classified and was distributed throughout Hughes management. I personally received and reviewed a copy of this audit report at that time. A true and correct copy of this audit report is attached hereto as Exhibit "A".

4. In the summer or fall of 1987, the government disclosed to Hughes' personnel a copy of Supplemental Audit Report No. 4511-B486004S1. I personally read and reviewed this audit report when it was disclosed to Hughes. This report

was not classfied. A true and correct copy of this audit report is attached hereto as Exhibit "B".

5. As a result of the audits pertaining to Hughes' use of Commonality Agreements to share costs among the B-2, F-15 MSIP, F-18 and F-14D contracts, the Defense Contract Audit Agency ("DCAA"), in 1987, questioned Hughes' accounting treatment of $11.8 million (later increased to $15.4 million) in costs incurred pursuant to the Commonality Agreements and temporarily caused that sum to be withheld from payments otherwise owed to Hughes under the B-2 subcontract.

6. In a letter dated June 14, 1988, the DCAA requested Hughes to provide comments or additional supporting data related to the disclosure of costs for the development of common advanced radar equipment in order to assist in DCAA's ongoing audits and investigations relating to the use of commonality agreements to charge common radar equipment costs to related contract programs. A true and correct copy of the letter I received is attached hereto as Exhibit "C". I responded to the DCAA's June 14, 1988 letter by letter dated July 8, 1988. A true and correct copy of this letter is attached hereto as Exhibit "D".

7. On July 26, 1988, Hughes gave a briefing to government officials to explain the use of "Commonality Agreements" and related Commonality issues. Following the July 26, 1988 briefing of Hughes' cost sharing practices with respect to the B-2, F-15 MSIP, F-14D and F-18 contracts, the Air Force Plant Representative Office ("AFPRO") sent Hughes a non-classified letter dated August 3, 1988, requesting a detailed breakdown of costs incurred by Hughes and charged pursuant to the Commonality Agreements for the Analog Signal Converter ("ASC") and Radar Data Processor ("RDP"). A true and correct copy of the August 3, 1988 letter is attached hereto as Exhibit "E". The AFPRO's inquiry focused on all aspects of the Commonality transactions—charges for part numbers during various development

stages and time periods, charges to the Commonality pools and allocations to the various contracts. Hughes responded to its inquiry to its satisfaction.

8. In 1988, the DCAA disclosed to Hughes that it was conducting another audit regarding Hughes' use of commonality agreements for the allocation of common radar costs at RSG. This audit culminated in Audit Report No. 4511-8B179009 dated September 27, 1988. Audit Report No. 4511-8B179009 was disclosed to me via cover letter dated November 7, 1988, from Thomas R. Tremper of the AFPRO. The Audit Report addressed alleged non-compliance with of commonality accounting practices for allocaiton of common radar costs at RSG. This Audit Report contained two attachments. A true and correct copy of this cover letter with the attached September 27, 1988 Audit Report and its accompanying attachments are attached hereto as Exhibit "F".

9. The September 27, 1988 Audit Report incorporated the findings of the October 16, 1986 audit report (described in paragraph 3 above) which had stated that commonality costs were allocated monthly to the F-15, F-14D, F-18 and the B-2 programs based on internal agreements made between the applicable Hughes program managers to share the development costs of common equipment. This audit report was not classified.

10. In an unclassified letter dated November 18, 1988, Hughes responded to the government's inquiries set forth in the September 27, 1988 Audit Report. A true and correct copy of this letter is attached hereto as Exhibit "G". Pursuant to this letter, Hughes participated in more non-classified meetings with the government to address the allegations concerning Commonality mishcharging, misbidding and Cost Accounting Standard 401 non-compliance, all of which had been raised in the non-classified Audit Reports discussed above.

11. Generally, the allegations and transactions addressed in the non-classified audit reports were subjected to

extensive rebuttals prepared by Hughes employees and communicated to the government in the form of non-classfied correspondence and briefing between 1986 and 1988.

12. As Group Controller, Vice President and Controller, and Vice President of Finance for Radar Systems Group, I have had experience reviewing hundreds of audit reports from the DCAA. Each and every audit report that I reviewed contained aboiler plate cover sheet relating to any Freedom of Information Act requests for audit reports similar to the one which is attached to Audit Report No. 4511-8B179009. Because the government often contacts Hughes when it receives a Freedom of Information Act request which would cover audit reports relating to Hughes and informs Hughes if it does in fact release any audit report relating to Hughes, I know that many of the audit reports relating to Hughes have been disclosed to members of the public via Freedom of Information Act Requests.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21st day of January, 1992 at Los Angeles, California.

/s/ Joseph Rohlinger
Joseph Rohlinger

DECLARATION OF EDWARD SAMUEL BALUCAS IN SUPPORT OF HUGHES' MOTION TO DISMISS PURSUANT TO F.R.C.P. 12(b)(1) AND 12 (h)(3)

I, Edward Samuel Balucas, declare and state:

1. I make this declaration in support of Hughes' Motion to Dismiss. I have personal knowledge of all of the facts stated herein and if called as a witness, I could and would testify competently thereto.

2. From 1967 through 1989, I was an employee of Hughes Aircraft Company ("Hughes"), where I worked as an accountant in various positions. From September 1978 to August 1983, I was manager of finance for the manufacturing division. From August 1983 until my retirement in 1989, I was the manager of cost accounting for the Radar Systems Group ("RSG"). My immediate supervisor was Joseph Rohlinger who was the RSG controller at that time.

3. As manager of cost accounting, I worked closely with the Defense Contract Audit Agency ("DCAA") whenever they conducted any unclassified audits.

4. In 1986, I was aware that the DCAA was conducting an audit at RSG to review, among other things, the costs incurred for the development of advanced radar components, and the propriety of the use of Commonality Agreements to share the costs of those components among various programs and contracts. During the course of this audit, the DCAA disclosed to me the matters which it was investigating. The results of the above-referenced audit are reflected in Audit Report No. 4511-7B486004, dated October 16, 1988. This audit report was not and is not to my knowledge classified. The DCAA disclosed this audit report to Hughes in 1986. I reviewed said audit report soon after it was disclosed to Hughes.

5. In 1987, the DCAA conducted a supplemental audit to review costs charged to RSG's commonality pool accounts. The DCAA disclosed to me the audit matters involved in the above-mentioned audit. The results of this audit were reflected in the unclassified Audit Report No. 4511-B486004SI, dated June 2, 1987, a copy of which the government provided to Hughes. I personally reviewed a copy of the audit report shortly after it was received at Hughes.

6. In 1988, the DCAA conducted another audit relating to RSG's commonality accounting practices. The purpose of the review was to determine whether the commonality accounting practices were part of RSG's disclosed accounting practices in accordance with the Cost Accounting Standards. Pursuant to this audit, the DCAA reviewed the charges of common radar equipment to various contract programs including the F-15 MSIP, the F-14D, F-18 and the B-2 to determine whether such charges were proper. The DCAA disclosed the audit matters involved in that audit with myself as well as with Mr. Rohlinger and Ms. Jackie Davis, another Hughes' accountant, and Mr. William Amos, manager of commonality hardware. The results of this audit were reflected in Audit Report No. 4511-8B179009, dated September 27, 1988. Said audit report was disclosed to myself and other management at Hughes at or about the time it was issued, and was not classified. I personally reviewed this audit report.

7. As manager of cost accounting for RSG, I have reviewed many audit reports from the DCAA. Each and every audit report that I have reviewed during the past 15 years contained a boiler plate cover sheet relating to Freedom of Information Act requests similar to the cover sheets attached to the three above-mentioned audit reports. Because the government often contacts Hughes to receive Hughes' consent before it releases an audit report relating to Hughes, and informs us of any such release, I know that many of the audit

reports relating to Hughes have been disclosed to the public at large via Freedom of Information Act requests.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21day of January, 1992 at North Hills, California.

/s/ Edward Samuel Balucas
Edward Samuel Balucas

DECLARATION OF HOWARD STONE
IN SUPPORT OF HUGHES' MOTION TO DISMISS
PURSUANT TO F.R.C.P. 12(b) (1) AND 12(h) (3)

I, Howard Stone, declare and state:

1. I am employed by Hughes Aircraft Company ("Hughes") and have been employed by Hughes since 1962 when I started work as program controls administrator. By the early 1980's, I had progressed to manager of division operations and at that time I worked on classified programs. I have personal knowledge of all the allegations and facts stated herein and if called as a witness, I could and would testify competently thereto.

2. As a representative from the program office for special projects, I attended a meeting on March 10, 1988 with the Defense Contract Audit Agency ("DCAA") regarding the Hughes' Radar System Group's ("RSG") cost allocation of common radar equipment via Commonality Agreements on the F-15 MSIP and the B-2 contract programs. This meeting was held as a result of the DCAA Form 1 notice of disallowance which had been issued on December 10, 1987, and which suspended $11.6 million in costs charged to the B-2 contract program based on questions raised by DCAA regarding the validity of this cost-sharing practice. During this meeting, the DCAA disclosed to Hughes information relating to said audit and investigation. I do not believe that this March 10, 1988 meeting was classified.

3. During this March 10, 1988 meeting, the DCAA and Hughes' representatives discussed the facts and circumstances relating to the Commonality Agreements pertaining to the B-2 contract and the F-15 MSIP contracts. The attendees also discussed the DCAA's concern that the Commonality Agreements resulted in the F-15 program not bearing the full costs of the receiver/exciter. DCAA also discussed its concerns with the cost allocations and charges made pursuant

to the Commonality agreements for the Analog Signal Convertor. I was present at this meeting.

4. The highlights of this meeting were documented in a "contact report" which I reviewed. A true and correct copy of which is attached hereto as Exhibit "A". The contact report reflects that two copies were sent to "Contracts". The contents of this "contact report" are an accurate reflection of some of the topics that were discussed at the March 10, 1988 meeting. This "contact report" was not classified when drafted and is not now.

5. On March 22, 1988, Air Force Plant Representative Office, the DCAA, and Hughes, at the request of the DCAA, had another meeting to discuss issues similar to the issues discussed at the above-reference March 10, 1988 meeting. The purpose of this meeting was to follow up on the March 10, 1988 meeting and to continue the discussion regarding cost charging for the Analog Signal Converter between the B-2 and F-15 MSIP programs. There was substantial discussion between the parties at this meeting of Hughes' 1983 F-15 MSIP pricing proposal which included the gate array enhanced Analog Signal Converter. During this meeting, the DCAA indicated that one of its concerns was whether Hughes should have made reductions to the proposed prices of the participating contracts when common development activities were identified. I do not believe that the meeting was classified. Seven people from Hughes Aircraft Company were present at this meeting including myself.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22 day of January, 1992, at El Segundo, California.

_____
Howard Stone

* * * *

DECLARATION OF JOSEPH ROHLINGER

I, Joseph Rohlinger, declare and say:

1. I was employed by Hughes Aircraft Company ("Hughes") between 1951 and October 1, 1989. From 1976 to 1984, I held the position of Group Controller of Radar Systems Group ("RSG"). From 1984 to 1987, I held the position of Vice President and Controller for RSG. In 1987, I was promoted to Vice President of Finance for RSG. I have personal knowledge of the facts contained herein and if called as a witness, I could and would testify competently thereto.

* * * *

42. Following the Air Force's audit, the AFPRO issued a report dated September 30, 1986, which I received a copy of shortly after its issuance, which concluded that the F-15 MSIP should have borne all of the development costs for the ASC which were allocated pursuant to Hughes' Commonality Agreements. The AFPRO's findings were incorporated into a Defense Contract Audit Agency ("DCAA") audit report dated October 16, 1986, which I also received shortly after its issuance. See September 30, 1986 AFPRO Report and October 16, 1986 DCAA Audit, copies of which are filed concurrently herewith as Exhibits 63 and 64 respectively.

43. The government continued to review Hughes' Commonality Agreements and accounting practices and I and other Hughes representatives met with the AFPRO and DCAA on numerous occasions to assist them in gathering facts. Hughes attempted to convey the chronology of events to the government auditors and the AFPRO which showed that the effort to design and develop the gate array enhanced ASC began in the Spring of 1982 on the B-2 contract, nearly two years prior to Hughes receiving authorization for that development effort under the second F-15 MSIP contract, Purchase Order E31011R.

* * * *

DECLARATION OF JOHN F. WILSON IN SUPPORT OF HUGHES' MOTION TO DISMISS PURSUANT TO F.R.C.P. 12(b) (1) AND 12(h) (3)

I, John F. Wilson, declare and state:

1. I am Director of Contracts for the Radar Systems Group of Hughes Aircraft Company ("Hughes"). I have been employed by Hughes since 1972 and have been in the Contracts organization since the inception of the Radar Systems Group ("RSG"). I became Associate Director of Contracts for the RSG in May 1984. I have been Director of Contracts for the RSG for six years, since January 1986. I have personal knowledge of the facts contained herein and if called as a witness, I could and would testify competently thereto.

2. In 1982, Hughes and Northrop Corporation entered into a cost-reimbursement type subcontract under which Hughes agreed to design and develop a complex, new radar for the B-2 Bomber. The B-2 contract and this subcontract were at that time highly classified. The B-2 aircraft was secretly under development by Northrop for the U.S. Air Force. Under this B-2 radar subcontract, Northrop agreed to pay Hughes its costs and a fee measured in part by the level of costs Hughes incurred under the subcontract (*i.e.*, a cost-plus-incentive-fee contract). At the request of U.S. Air Force officials and senior Northrop employees, Hughes designed and developed radar components for the B-2 which could be used in several different aircraft radars also made by Hughes.

3. When common parts are designed, developed or manufactured for use under several different radar subcontracts, the costs of such design and development must be appropriately accounted for. Since 1978, Hughes has accounted for such costs by allocating them among the different benefiting subcontracts to ensure that each benefiting subcontract absorbs its fair share of the costs. The accounting controls and cost sharing arrangements were established by

Hughes for each radar program and were set forth in Hughes' Commonality Agreements.

4. During the course of a series of government audits and investigations of Hughes relating to the B-2 subcontract, a dispute arose with the government involving Hughes' method of accounting for costs incurred by Hughes to design and develop certain radar components that were ultimately utilized not only in the B-2 radar but in other Hughes' radars as well.

5. Because of the extraordinary secrecy surrounding the B-2 program during the 1980's, certain government auditors mistakenly concluded that Hughes had been contractually obligated to develop certain components for the F-15 Multistage Improvement Program ("MSIP") radar subcontract and had mischarged part of the costs of that effort from the F-15 MSIP subcontract to the B-2, the F-14D and the F-18 subcontracts pursuant to the Commonality Agreements. This conclusion was first alluded to in Air Force Audit Report No. 86-5 which was then classified.

6. On July 30, 1986, Hughes received a copy of the classified Air Force Audit Report No. 86-5, a true and correct copy of which is attached hereto as Exhibit "A".

7. Following this initial classified audit conducted by the Air Force, a series of non-classified government audits and investigations were conducted and openly discussed with Hughes' representatives throughout the period of 1986 to 1988.

8. Hughes received a copy of unclassified Audit Report No. 4511-7B486004 dated October 10, 1986 from the government. This Audit Report was disclosed to Hughes management without any classified or secret restrictions. I read the October 1986 Audit Report from the DCAA. It pertains to the same issues as the classified Audit Report No. 86-5 referred to above.

9. Hughes RSG received a copy of Audit Report No. 4511-B486004SI, dated June 2, 1987 from the government. This Audit Report was disclosed to Hughes management and had no classified restrictions. I also read that Audit Report.

10. As a result of the Audit Reports described above, the government directed Northrop to withhold $11.8 million in costs under the Hughes B-2 subcontract which was reflected in the December 10, 1987 DCAA Form 1, a true and correct copy of this document is attached hereto as Exhibit "B". The government subsequently directed the amount of money withheld to be increased to $15.4 million.

11. On July 26, 1988, Hughes gave a briefing to fourteen government officials representing the Air Force Plant Representative Office ("AFPRO"), the Defense Contract Audit Agency ("DCAA"), the Air Force program offices for the B-2 and F-15 programs and the Navy program offices for the F-14 and F-18 programs to explain the Commonality Agreements, the accounting system, the contract pricing, the contract terms, the timing of contractual authorizations, and the resulting cost benefits to the government. I was present at this briefing. The briefing (none of which was classified) addressed all aspects of the Commonality issues.

12. In November of 1988, I received from the AFPRO the September 27, 1988 DCAA Audit Report No. 4511-8B179009 which pertained to essentially the same matters as did the 86-5 classified Audit Report and the October 16, 1986 unclassified Audit Report. This Audit Report had no secret or classified restrictions and was distributed throught RSG's management.

13. In 1988, representatives of the government and RSG, including myself, engaged in open dialogue regarding the Commonality issues. This was an important substantial issue for RSG, management in 1988 and received a great deal of attention. RSG's management, including William Schumer, was aware of the allegations raised by the government

concerning RSG's commonality accounting practices and cost allocations because of the importance of the issue and frequency with which it was discussed.

14. In response to both the government's withholding of money from Hughes, and the questions raised in the government's audit reports and investigation of the Commonality issues, Hughes submitted a formal claim to the government, under Northrop's sponsorship pursuant to the Contract Disputes Act. Hughes' claim, received by the government in October 1991, explained: (a) the propriety of the cost allocations made pursuant to the Commonality Agreements; (b) the fact that the Commonality Agreements had been disclosed to Northrop and to the government; (c) the propriety of the Commonality accounting methodology; and (d) the overall cost benefit to the government which was intended and achieved. Hughes' claim to the government was paid in full on December 2, 1991, and all withheld monies were returned to Hughes.

15. As Director of Contracts for RSG, I am familiar with the job responsibilities of Manager Major Program, Contracts, and Division Manager of Contracts for Hughes RSG Special Programs, which are the positions that William J. Schumer held at RSG between 1981 and 1988. From May 1984 to September 1988, during which time I was the Associate Director of Contracts and then in 1986, the Director of Contracts for RSG, Schumer directly reported to me. The job responsibilities of Mr. Schumer in the above job positions only pertained to the contract administration, negotiations and related work on the B-2 subcontract with Northrop and other small classified projects. Mr. Schumer did not work on any F-14D, F-15 MSIP or F-18 contract programs. His job responsibilities did not include or relate to the charging of common radar costs to various contracts and/or programs.

16. I have read Mr. Schumer's First Amended Complaint, Case No. CV89-0390. Mr. Schumer's job responsibilities at RSG would not give him direct knowledge of the

material allegations in his First Amended Complaint concerning Hughes' bids on the F-15 MSIP, F-14D and F-18 contracts or costs charged pursuant to the Commonality Agreements.

17. I have read and reviewed Mr. Schumer's Disclosure Statement served on the government. A true and correct copy of the Disclosure Statement to which I am referring is attached hereto as Exhibit "C". An unsigned memorandum dated March 15, 1985 from K.M. Tasugi to me is attached to said Disclosure Statement as Exhibit A. Schumer was not involved in any way with the authoriship of this March 15, 1985 memorandum nor was it intended for his review. Mr. Schumer's job responsibilities at Hughes would not have given him direct knowledge of the material matters contained in said memorandum.

I have under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of January, 1992 at El Segundo, California.

/s/ John F. Wilson
John F. Wilson

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(cover page omitted in printing)

I.

INTRODUCTION

Defendant Hughes Aircraft Company ("Hughes") moves to dismiss this *qui tam* lawsuit for lack of subject matter jurisdiction on the grounds (1) that Schumer's complaint is based upon allegations and transactions which were publicly disclosed prior to the filing of this action in a series of unclassified government audits and investigations, and (2) that Schumer is not an original source of that publicly disclosed information.[1]

Schumer complains that Hughes mischarged costs to develop radar equipment which would be used in four different aircraft radar subcontract programs. Specifically, Schumer alleges that costs which should have been charged to an F-15 contract were improperly charged to the B-2, F-14, and F-18 contracts. The mischarging was allegedly carried out by means of so-called "secret" Commonality Agreements, which allocated costs incurred for efforts that benefit more than one contract.

Schumer has relied upon the fact the government withheld $15.4 million from Hughes while it investigated Hughes' cost allocations. The investigation resulted in the Government approving Hughes' cost allocations and paying to Hughes the entire amount.

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[1] The suit was filed under the Civil False Claims Act, 31 U.S.C. § 3729, *et seq.* ("FCA"). Suits based on such public information are jurisdictionally barred unless the plaintiff can demonstrate that he is an "original source" of the public information. 31 U.S.C. § 3730(e)(4).

This motion will demonstrate that Schumer's allegations are based on matters that were the subject of publicly disclosed unclassified audit reports and other unclassified communications from the government.[2] Moreover, Schumer admits that he was not an original source of the information that was the subject of these public disclosures.[3]

A. Background

1. The B-2 Subcontract.

In 1982, Hughes and Northrop Corporation entered into a cost-reimbursement type subcontract under which Hughes promised to design and develop a complex new radar for the B-2 Bomber, then under secret development by Northrop for the U.S. Air Force. Under this B-2 radar subcontract, Northrop promised to reimburse Hughes for its costs and to pay a reasonable profit. At the request of U.S. Air Force officials and senior Northrop employees, Hughes designed and developed radar components for the B-2 which could be used in several different aircraft radars also made by Hughes. (Declaration of John Wilson ("Wilson Decl."), ¶ 2, attached hereto as Exhibit 3.) Hughes thereby advanced the state of the art, and found new applications for existing technology.

During the course of a series of government audits and investigations of Hughes relating to the B-2 subcontract, a dispute arose with the government involving Hughes' method of accounting for costs incurred by Hughes to design and

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[2] In 1990, Hughes moved for summary judgment based on the release of a single classified Air Force audit report to Hughes and Northrop. The Court held that classified report was not "publicly disclosed." This motion does not involve that classified report.

[3] Hughes has filed, simultaneously with the instant motion, a motion for summary judgment which demonstrates the complete lack of merit in Schumer's complaint. The Court may properly dismiss this case in its entirety on the jurisdictional issues addressed in the instant motion without deciding Hughes' other motion.

develop certain radar components used not only in the B-2 radar but in other Hughes' radars as well. (Wilson Decl., ¶ 4.) This same dispute is the essence of Schumer's complaint.

* * * *

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WILLIAM J. SCHUMER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel., WILLIAM J. SCHUMER, Plaintiff, v. HUGHES AIRCRAFT COMPANY, Defendants.	)Case No.)CV 89-0390 MRP (Bx)))QUI TAM PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I.

INTRODUCTION

This memorandum will be brief. Conversely, the Qui Tam Plaintiff's separate statement of Material Facts is rather

detailed. It is not the purpose to this memorandum to minutely reiterate the factual matters covered in the separate statement of material facts, but rather to highlight some of the points raised in the separate statement that reveal the shallow spin, selectively culled facts, twisted sequence, and manipulative use of precisely placed wording to attempt to develop a scenario which is simply contrary to the actual events that took place giving rise to this action.

II.

BRIEF SUMMARY OF MATERIAL FACTS[4]

This case involves, primarily, the cost pooling of direct labor costs associated with the development and production of various radar modules for the F-15, F-14 and B-2 aircraft.

In the late seventies and early eighties, Hughes had been involved in various development and production programs involving the F-15 and F-18 radar systems. It was at this time that it negotiated for and was awarded the B-2 radar subcontract.

Hughes' receipt of the B-2 radar subcontract was premised on its ability to bring to the program a number of existing radar modules, which together make up the entire radar, at minimal development costs. Most estimated development costs related to the antenna and required interfaces between the various "existing technology" "off the shelf" modules. Hughes represented that these modules would be obtained from F-15 and F-18 designs.

At the time Hughes received the B-2 contract, the mission profile was fixed and remained so. That mission profile required the B-2 radar to operate at high and low altitudes. At about the same time, a new F-15 Multi-stage

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[4] The Qui Tam plaintiff incorporates, herein, by reference, those factual matters set forth in his separate statement of material facts, filed concurrently herewith.

Improvement Program was directed, first, at studying improvements and, secondly, at developing improvements. After the B-2 contract was definitized in October 1982, Hughes was successful in convincing Northrop to change to the newer F-15 modules on the basis that the F-15 program would continue to pay for the development costs for these modules.

Two radar modules from the F-15 program are pertinent to this case, one is the Analog Signal Converter ("ASC"). The other is the Radar Data Processor ("RDP").

In 1982 and 1983, Hughes conducted an ongoing "study effort" relating to combining two modules, including the receiver/exciter into one ASC. The study effort included a look at new micro-circuitry, called gate arrays. This study effort was funded by the F-15 program. In early 1989, the prime contractor gave the full go-ahead to Hughes, with covetage for prior F-15 gate array development efforts, for the use of gate array technology.

Hughes mischarged gate array F-15 development efforts to the B-2 subcontract. Hughes subsequently rationalized this mischarging to the Air Force by claiming that the Air Force "approved" the "development" of gate array technology for the B-2 prior to the point in time in which such technology was approved in the F-15 program. As the separate statement of material facts points out, this is a facade. In fact, Hughes could not have charged gate array development efforts to the B-2 for a variety of reasons, including the fact that gate array technology represented the utilization of unqualified gate array which required Hughes to seek qualification before use. There is no evidence that Hughes ever sought to qualify this unqualified technology for th B-2, unlike Hughes' full written gate array change proposals directed specifically to the prime contractor for the F-15. Secondly, in its formal gate array cost proposals to the prime contractor on the F-15, Hughes certified that no prior "actuals" (prior labor

hours) existed for the purpose of estimating the gate array efforts.

The means in which Hughes mischarged development efforts for the F-15 radar data processor was equally deceptive. Basically, Hughes established an internal criteria which arbitrarily set the baseline between the development stage and the production stage of the F-15 at an earlier point than addressed in the contract, it's own representations to Northrop, the prime contractor, and the Air Force, and applicable military standards and regulations. It then called development efforts production/fabrication efforts and mischarged to the B-2 contract, accordingly.

Hughes, eventually, pulled the F-14 program into this loop with representations regarding existing F-15 technology.

The manner in which this mischarging occurred and the vehicle employed was through internal/unilateral "memorandums of agreement" (MOA") between internal Hughes project managers which set forth a cost pooling scheme involving direct material and labor costs. These cost pooling or cost sharing internal memorandums were entirely inconsistent to the manner in which Hughes had certified, proposed and estimated it's proposals for the B-2 and F-15 radar sub-contracts and remained unknown to the cognizant Northrop B-2 subcontracts manager until mid 1984 when Hughes' accounts "started to blow." Hughes was already engaged in this cost pooling scheme with the F-14 subcontract before it even finalized it's proposal and only informed Grumman, the prime contractor, after the government began an audit.

During the course of the F-15, B-2 and F-14 subcontracts, Hughes submitted weekly invoices for payment that misrepresented to the prime contractors that the direct labor and material costs set forth in these invoices represented costs accumulated in compliance with the applicable contract. These contracts incorporated Cost Accounting Standards, including CAS 401, and were premised on the incorporation of

existing/non-developmental technology. These invoices represent false claims for payment pursuant to 31 USC §3729.

III.

HUGHES COSTS POOLING WAS NOT ALLOWABLE AND WAS INCONSISTENT TO THE MANNER IN WHICH IT NEGOTIATED THE RADAR SUBCONTRACTS

Cost Accounting Standard ("CAS") 401, incorporated in the B-2 and F-15 subcontracts, states that a contractor's practices used in estimating costs in pricing a proposal shall be consistent with his cost accounting practices used in accumulating and reporting costs. FAR 30.401-40(a). Further, a contractor's cost accounting practices used in accumulating and reporting actual costs for a contract shall be consistent with his practices used in estimating costs in pricing the related proposal.

Hughes estimated and proposed the B-2 subcontract based on efforts associated with incorporating existing radar technology with respect to the Analog Signal Converter and Radar Data Processor. It did not propose or estimate costs or effort associated with the development of such systems and it did not propose or estimate costs on the basis of any "cost pooling" or "cost sharing" arrangement with unilateral and arbitrarily assessed share percentages with other programs. It did not propose and estimate the F-15 subcontracts on the basis of any such cost-sharing arrangement.

Hughes billed the prime contractors on the basis of the terms and conditions of it's contracts. These invoices did not disclose any "cost sharing" arrangement, the percentage of effort divided by virtue of these arrangements, or the programs in which such efforts and funds were divided. The invoices violated CAS 401, the applicable provision in the contract, including flow-down cost segregability clauses in the B-2 contract, and represented false claims for payment.

Hughes' cost pooling shared costs, therefore, were unallowable. Allowable costs are defined as follows:

> "The factors to be considered in determining whether a cost is allowable include the following:
>
> (1) Reasonableness.
>
> (2) Allocability.
>
> (3) Standards Promulgated by the CAS Board, if applicable; otherwise, generally accepted accounting practices appropriate for the particular circumstances.
>
> (4) Terms of the contract.
>
> (5) Any limitations set forth in this sub-part." FAR 31-201-2(a).

In its brief, Hughes sets forth the definition of "allocability" which is found at FAR 31-201-4 but fails to clearly identify "allocability" as merely a subset of "allowability." Even under the definition of allocability, a cost is allocable if it is incurred specifically for the contract. Charging the B-2 Program for F-15 development efforts did not include efforts that were incurred specifically for the B-2 contract.

IV.

THE GOVERNMENT HAS NOT RESOLVED ANY FALSE CLAIMS ACT VIOLATION WITH THE DEFENDANT

Hughes attempts to paint the government satisfied with it's own explanation of events and, therefore, it argues, the case should be dismissed. The government has, however, continued to preserve its claim over any recovery obtained in this case and has specifically left open the issue of any CAS violations. Furthermore, the administrative contracting officers that are now "satisfied" with Hughes' explanation and have "resolved", according to the defendant, any outstanding issues in Hughes' favor simply have no jurisdiction or authority to determine or adjudicate issues of fraud or violations of the False Claims Act.

An action for fraud or a violation of the False Claims Act against a contractor is not subject to a contracting officer's decision. See *Martin J. Simko Constr. Co. v. United States*, 852 F.2d 540 (Fed.Cir. 1988); *Chinook Research Laboratories, Inc. v. United States*, 22 cl. ct. 853, 856, fn.3 (1991).

V.

CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment should be denied.

DATED: February 18, 1992

LAW OFFICES OF HERBERT HAFIF

By: /s/ P. Benson
Phillip E. Benson

DECLARATION OF WILLIAM J. SCHUMER

I, William J. Schumer, declare as follows:

1. I came to Hughes Radar Systems group on May 1, 1981 with the title of Manager, Major Program Contracts. I was formally accessed to the B-2 Program in September of 1981, prior to Hughes being notified that they had been selected.

* * *

33. With regard to P5, ¶13 of the original complaint the fact that my personal recollection was faulty and I cited the F-18 rather than F-14 is the result of, and confirms the fact that, I had seen no audit reports at the time this qui tam suit was filed.

* * *

(g) With respect to ¶8, P.3 L.21 to P.4, L.8 - again, this Exhibit 1C does not refer to the B2. On September 2, 1988, my HAC employee badge was taken from me, the locks on my files and office door were changed, and I was escorted off the RSG premises, so I obviously could not have been aware of any September 27 meetings, nor the audit report dated September 27, but not conveyed to HAC until November 7, 1988 (Bates #000048).

* * * *

SUPPLEMENTAL DECLARATION OF JOHN F. WILSON IN SUPPORT OF HUGHES' REPLY TO SCHUMER'S OPPOSITION TO MOTION TO DISMISS

I, John F. Wilson, declare and state:

1. I am Director of Contracts for the Radar Systems Group of Hughes Aircraft Company ("Hughes"). I have been employed by Hughes since 1972 and have been in the Contracts organization since the inception of the Radar Systems Group ("RSG"). I became Associate Director of Contracts for the RSG in May 1984. I have been Director of Contracts for the RSG for six years, since January 1986. I have personal knowledge of the facts contained herein and if called as a witness, I could and would testify competently thereto.

2. During my employ at Hughes, I had knowledge of the nomenclature used for the B-2 contract during the time it was classified and after. Due to its once classified nature, the B-2 subcontract was often referred to as the "Special Project" program or "AHEP" program. Thus, such terms utilized in the unclassified audit reports referred to in my original declaration in support of Hughes' Motion to Dismiss are synonymous with the B-2 program.

3. In March of 1991, I received a letter from Thomas E. Woolpert of the Defense Plant Representative Office informing me of a Freedom of Information Act ("FOIA") Request from Pace, Quinn and Rose ("PACE"), then Schumer's counsel in the above-referenced action. In this letter, Mr. Woolpert requested that Hughes review the documents requested by PACE to determine if such documents were exempt under 5 U.S.C. § 552(b)(4). A true and correct copy of the March 25, 1991 letter I received and reviewed is attached hereto as Exhibit A. As set forth in the letter, the list of documents subject to the FOIA request included the October 1986, June 1987 and September 1988 audit reports referred to in

Hughes' Motion to Dismiss and in my early Declaration in support thereof.

4. Pursuant to said March 25, 1991 letter, Hughes did, in fact, review the audit reports requested. Upon such review, Hughes decided not to claim that such documents were exempt under the Freedom of Informations Act and indicated to the government that it had no objections to disclosure under the FOIA. A true and correct copy of the letter I sent to the government which expressed Hughes' consent to the disclosure of the requested documents via the FOIA is attached hereto as Exhibit B.

5. I am informed and believe that the government did, in fact, disclose the requested documents to Schumer's counsel pursuant to its FOIA request.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26 day of February, 1992 at El Segundo, California

/s/ John F. Wilson
John F. Wilson

* * * * *

DECLARATION OF YVONNE PERLBERG IN SUPPORT OF HUGHES' REPLY TO SCHUMER'S OPPOSITION TO MOTION TO DISMISS

I, Yvonne Perlberg, declare and state:

1. I am currently Director of Government Liaison and Contract Compliance at Hughes Aircraft Company ("Hughes"), and have been an employee at Hughes since 1988. Prior to my employment at Hughes, I worked for the Defense Contract Audit Agency ("DCAA") for 20 years, between 1968 and 1988. My last position with the DCAA was Deputy Regional Director for the Southwestern Region. I have personal knowledge of the matters stated herein and if called as a witness, I could and would testify competently thereto.

2. From the 20 years of experience I gained while working for the DCAA, and during the course of my employment at Hughes, I have become familiar with and do have personal knowledge of the procedure for the conducting of audits and the disclosure of audit reports. An audit report is considered an internal government document and is normally disclosed only within the Department of Defense, except (i) to an agency requesting the report in negotiating or administering its contract or (ii) to U.S. Government investigatory agencies. Generally, the DCAA will only disclose audit reports or the matters stated therein to (i) the requester of the audit and (ii) the subject of the audit. It is not the DCAA's policy to disclose the subject matter of audits and/or the audit reports themselves to the public. Under the provisions of Title 32, Code of Federal Regulations, Part 290.26(b)(2), any Freedom of Information Act requests for audit reports received by the DCAA are referred to the cognizant contracting agency for determination as to releasability and a direct response to the requester. Audit reports and/or matters stated therein (i) are not intended to be disclosed and are generally not disclosed to

the public at large and (ii) are not disseminated through news media or other methods of public dissemination.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of February, 1992 at Los Angeles, California.

/s/ Yvonne Perlberg
Yvonne Perlberg

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *ex rel.*, WILLIAM J. SCHUMER,	) Civil No. CV 89-0390-MRP (Bx)
Plaintiff,	) DEFENDANT
vs.	)HUGHES AIRCRAFT) COMPANY'S) REPLY TO) PLAINTIFF'S) OPPOSITION TO) MOTION FOR) SUMMARY
HUGHES AIRCRAFT COMPANY	) JUDGMENT
Defendant.	) Date: March 9, 1992) Time: 10:00 a.m.) Courtroom: Hon.) Mariana R.) Pfaelzer

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III. SCHUMER'S OPPOSITION SHOWS THAT HE HAS SHIFTED HIS THEORY TO ANOTHER UNSUPPORTABLE CONCEPT.

Having recognized that he cannot proffer any evidence to support the allegations in his complaint regarding misbidding and mischarging costs, Schumer has, in his opposition brief, alleged a new theory which is also unsupported and without merit. He asserts that Hughes did not estimate its bid costs in a manner consistent with the way costs were accumulated, and that this supposed inconsistency was in violation of Cost Accounting Standard ("CAS") 401, 48 CFR § 30.401.

The assertion that Hughes violated CAS 401 is not contained in Schumer's complaint and is unrelated to the allegations contained therein.[19] Therefore, it is outside the scope of this suit, and not relevant to Hughes' motion for summary judgment. The nonmoving party cannot raise genuine issues of fact in an effort to defeat summary judgment by addressing matters beyond the scope of the complaint. *United States ex rel. Sacks v. Philadelphia Health Management Corp., supra*, 519 F. Supp. At 845.

In addition to being outside the scope of the complaint, Schumer's assertion that Hughes violated CAS 401 is also unsupported and wrong. The provision cited in Schumer's brief states in its entirety:

> A contractor's practices used in estimating costs in a pricing proposal shall be consistent with his costs accounting practices used in accumulating and reporting costs.

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[19] Schumer's proposed amended complaint also does not contain or refer in any way to this allegation.

48 CFR § 30.401-40(a). Schumer's theory is that because Hughes' original technical proposal for the B-2 radar *referenced* the utilization of an ASC and RDP that were "off the shelf" (i.e. already developed), Hughes' development of new components in lieu of using the "off the shelf" components resulted in costs charged to the B-2 that were not "consistent" with Hughes' proposed costs.[20]

Schumer would have the Court believe that CAS requires a product to be built in the same manner in which it was proposed or estimated. That is not what CAS 401 requires. CAS 401 is concerned with insuring that a contractor's "accounting practices" used in estimating costs for a proposal are consistent with the practices used in accumulating the costs.[21] There is no requirement in CAS 401 that the product built must be just as it was proposed. There is also no requirement, as seems to be implied by Schumer, that costs "accumulated" on a contract cannot exceed the amount "estimated" in a proposal.

Hughes' obligation under CAS 401 was to "accumulate and report" the actual costs incurred in achieving the performance requirements of the contract; it was also required to "estimate" the cost of achieving the performance requirements of the contract. Hughes did both; therefore, there is no inconsistency as contemplated by CAS 401 in Hughes' estimating, on the one hand, and accumulating and reporting, on the other, its costs of achieving the performance specifications on the B-2 subcontract.

Schumer's theory is based not only upon a misreading of CAS 401 but on a mischaracterization of the B-2

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[20] Plaintiff's Separate Statement of Material Facts, responding to Fact No. 21. As discussed above, Hughes, in fact, did not charge the B-2 subcontract for the costs of developing the advanced RDP.

[21] The purpose of CAS 401 is to "facilitate the preparation of reliable cost estimates used in pricing a proposal and their comparison with the costs of performance . . . ." 48 CFR § 30.401-20.

subcontract as if it contained a requirement to build the RDP and ASC according to a design specification, i.e. a specific design configuration set forth in the subcontract (such as the plans for a building). Hughes established in its separate statement of facts that the B-2 subcontract was a cost reimbursement type contract which required Hughes to meet *performance*, not design specifications, and Hughes could employ any design that could meet the performance requirements.[22]

While Hughes' proposal described conceptual approaches to meet the Air Force's performance specifications, the proposal did not represent a promise by Hughes to build the radar according to the configurations described in the proposal. Fact No. 16. The Air Force's chief engineer for the B-2, John Griffen, testified as to the Air Force's understanding of the B-2 radar subcontract:

> We would just write a set of performance requirements and let the contractor make the decision as to who and how he wants to build it. We never get involved in the design level.

Griffen Depo., Exh. 12, p. 21, lines 22-24. Hughes' B-2 proposal clearly was not intended to and did not establish a fixed design configuration. Rather, Hughes' proposal was based on what Hughes thought at the time might accomplish the B-2's performance specifications. The fact that a different design approach was undertaken based on efforts to develop

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[22] Schumer's theory that the B-2 subcontract required Hughes to employ "off the shelf" radar units is inconsistent with the purpose of a cost-reimbursement type contract which the applicable regulations define as being "suitable for use only when uncertain ties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of a fixed-price contract." 48 CFR § 16.301-2. The regulations further provide that cost-plus incentive fee contracts -- like the B-2 radar subcontract -- are appropriate for "development" programs. 48 CFR § 16.404-1(b)(1). "Off-the-shelf" equipment does not equate to a development program.

new radar units to meet the performance specifications does not in any way give rise to any CAS 401 issue.

Schumer has also failed to demonstrate any nexus between his theory of a CAS 401 violations and any false claim. Schumer asserts that Hughes' invoices violated CAS 401 because the invoices did not refer to the cost sharing provisions of the Commonality Agreements and therefore constituted false claims. Schumer cites no authority for the proposition that invoices are required or intended to contain this type of information, which they are not. CAS 401 does not contain any requirement concerning the type of information to be set forth on an invoice.

Hughes has demonstrated that Schumer's allegations of mischarging and misbidding set forth in the complaint are without merit. By raising an altogether different but equally unfounded allegation that Hughes' accounting practices were in violation of CAS 401, Schumer is attempting to make it appear to the Court as if there is a genuine issue upon which to defeat summary judgment. Since CAS 401 clearly does not stand for the proposition asserted by Schumer, he has failed in that attempt.

* * * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *ex rel.*, WILLIAM J. SCHUMER,	)
Plaintiff,	)CASE NO. CV 89-390 MRP
v.	)
HUGHES AIRCRAFT COMPANY,	)ORDER DENYING MOTION TO DISMISS
Defendant.	)

Hughes Aircraft Company's Motion to Dismiss came on regularly for hearing on March 23, 1992 before this Court. The Court having considered the pleadings, papers, and the arguments of counsel,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss is denied.

DATED: May 19, 1992

/s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, ex rel. WILLIAM J. SCHUMER,	)NOS. 92-55759, 92-55857
Plaintiff-Appellant/ Cross-Appellee,	)DC NO. CV-89-0390-MRP
v.	)ORDER
HUGHES AIRCRAFT COMPANY,	
Defendant-Appellee/ Cross-Appellant.	

Before: D.W. NELSON, REINHARDT, and BRUNETTI, Circuit Judges.

Hughes Aircraft Company's motion to stay issuance of mandate pending petition to Supreme Court for writ of certiorari is hereby granted.

DEPARTMENT OF DEFENSE CONTRACT PRICING PROPOSAL	FORM APPROVED OMB NO. 22-RO361

This form is for use in procurements when submission of cost or pricing data is required (SEE DAR 3-[illegible])

NAME, ADDRESS, AND TELEPHONE NUMBER OF ORGANIZATIONAL ELEMENT RESPONSIBLE FOR SUPPORTING PROPOSAL	TYPE OF CONTRACT CPFF/Award Fee	
HUGHES AIRCRAFT COMPANY RADAR SYSTEMS GROUP P.O. Box 92426 Los Angeles, Ca. 90009	PLACE(S) AND PERIOD(S) OF PERFORMANCE Period of Performance: 1981 - 1990 Place: So. Calif. area	
TOTAL 183,841,123 COST 14,235,504 PROFIT/FEE TOTAL 198,076,627	TYPE OF PROCUREMENT ACTION ☐ OTHER (SPECIFY) ■ NEW PROCUREMENT ☐ LETTER CONTRACT ☐ CHANGE ORDER ☐ UNPRICED ORDER ☐ PRICE REVISION/ REDETERMINATION	

LINE ITEM NO.	NOTE: List and reference the identification, quantity and total price proposed for each contract line item. A line item cost breakdown supporting this recap is required unless otherwise specified by the Contracting Officer. (Attach continuation page if required.) Total Program - Full Scale Development (Then Year Dollars)	QUANTITY Lot	TOTAL PRICE 198,076,627	REF. Sch A

I. IF YOUR ACCOUNTS AND RECORDS HAVE BEEN REVIEWED IN CONNECTION WITH ANY GOVERNMENT CONTRACT (PRIME OR SUBCONTRACT), GRANT OR PROPOSAL WITHIN THE LAST 3 YEARS BY A GOVERNMENT AGENCY OTHER THAN IRS OR GAO, PROVIDE NAME, ADDRESS AND TELEPHONE NUMBER BELOW

CONTRACT ADMINISTRATION OFFICE	AUDIT OFFICE
AIR FORCE PLANT REPRESENTATIVE OFF. HUGHES AIRCRAFT COMPANY LOS ANGELES, CA 90009	DEFENSE CONTRACT AUDIT AGENCY c/o HUGHES AIRCRAFT COMPANY EL SEGUNDO, CA. 90245

II. WILL YOU REQUIRE THE USE OF ANY GOVERNMENT PROPERTY IN THE PERFORMANCE OF THIS WORK
■ YES ☐ NO IF YES, IDENTIFY See Special Terms and Conditions of the Contract Volume

III. DO YOU REQUIRE GOVERNMENT CONTRACT FINANCING TO PERFORM THIS PROPOSED CONTRACT?
☐ YES ■ NO IF YES, IDENTIFY ADVANCE PAYMENTS PROGRESS PAYMENTS OR GUARANTEED LOANS

IV. HAVE YOU BEEN AWARDED ANY CONTRACTS OR SUBCONTRACTS OF THE SAME OR SIMILAR ITEMS WITHIN THE PAST 3 YEARS?
☐ YES ☒ NO IF YES, IDENTIFY ITEMS CUSTOMERS AND CONTRACT NUMBERS:

V. IS THIS PROPOSAL CONSISTENT WITH YOUR ESTABLISHED ESTIMATING AND ACCOUNTING PRACTICES AND PROCEDURES AND DAR SECTION XV COST PRINCIPLES?
☒ YES ☐ NO IF NO, EXPLAIN

VI. COST ACCOUNTING STANDARDS BOARD (CASB) DATA (PUBLIC LAW 91 379 AS AMENDED):

a. WILL THIS PROCUREMENT ACTION BE SUBJECT TO CASB REGULATIONS?
☒ YES ☐ NO IF NO, EXPLAIN

b. HAVE YOU SUBMITTED A CASB DISCLOSURE STATEMENT (CASB DS 1 OR 2)?
☒ YES ☐ NO IF YES, SPECIFY THE OFFICE TO WHICH SUBMITTED AND IF DETERMINED TO BE ADEQUATE
Hughes A/F Plant Rep. Office (Adequate)

c. HAVE YOU BEEN NOTIFIED THAT YOU ARE OR MAY BE IN NONCOMPLIANCE WITH YOUR DISCLOSURE STATEMENT OR COST ACCOUNTING STANDARDS?
☐ YES ☒ NO IF YES, EXPLAIN

d. IS ANY ASPECT OF THIS PROPOSAL INCONSISTENT WITH YOUR DISCLOSED PRACTICES OR APPLICABLE COST ACCOUNTING STANDARDS?
☐ YES ☒ NO IF YES, EXPLAIN

This proposal is submitted in response to (RIP contract/_____, etc.) __P-300-RKB-2-164_____ and reflects our best estimates and/or actual costs as of this date, in accordance with the instructions of this form.

TYPED NAME AND TITLE	SIGNATURE
J. R. Rohlinger, Group Controller Radar Systems Group	(illegible) for J.R. Rohlinger

NAME OF FIRM	DATE OF SUBMISSION
HUGHES AIRCRAFT COMPANY	

Previous edition is obsolete. Replaces DD Forms 623-1 through 5. Apr. (illegible) and DD Form 6334. June 72, which are obsolete.

DS FORM 633
1 April 79

(9)

Supreme Court, U.S.
FILED
NOV 27 1996

No. 95-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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November 27, 1996

39 pp

QUESTIONS PRESENTED

1. Whether the 1986 amendments to the False Claims Act, which relaxed the restrictions on *qui tam* lawsuits, apply retroactively to actions challenging pre-1986 conduct.
2. Whether the False Claims Act permits employees of government contractors to file "parasitic" *qui tam* actions based on allegations disclosed by the Government in an audit or investigation.
3. Whether the False Claims Act imposes liability for alleged infractions of other statutes or regulations regardless of whether such infractions result in a "false claim" against the public fisc.

PARTIES TO THE PROCEEDING

Petitioner, Hughes Aircraft Company, was appellee/cross-appellant below. Respondent, William J. Schumer (litigating on behalf of the United States of America), was appellant/cross-appellee below.

Pursuant to this Court's Rule 29.6, petitioner notes that it is a wholly-owned subsidiary of HE Holdings, Inc., which is in turn a wholly-owned subsidiary of Hughes Electronics Corporation ("HEC"). HEC, in turn, is a wholly-owned subsidiary of General Motors Corporation, which has issued various classes of shares to the public. The earnings of HEC are used to calculate the earnings per share of General Motors Class H common stock (New York Stock Exchange: GMH).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-1340

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

INTRODUCTION

This case involves a statute, the False Claims Act ("FCA"), with an enforcement mechanism that is virtually unique in the U.S. Code. The Act makes those who knowingly submit a false claim to the Government liable to the Government, but provides for enforcement not only by the Executive Branch but also by private parties ("relators") acting on behalf and in the name of the United States. A successful relator is entitled to a portion of any monies recovered for the public fisc. Such private "*qui tam*" actions have roots in ancient English law predating the development of the investigatory and law-enforcement powers of the modern state. (The phrase "*qui tam*" is short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means "he who brings the action as much for the king as for himself.")

The FCA's *qui tam* provisions are hardly a recent innovation. To the contrary, they were first enacted in 1863, at the height of the Civil War, when the feeble enforcement resources of the Executive Branch proved incapable of ferreting out fraud by unscrupulous government contractors. *See* Act of March 2, 1863, ch. 67, 12 Stat. 696. Federal law enforcement at that time was virtually nonexistent; indeed, the Department of Justice was not established until 1870. Notwithstanding the rise of a vast federal investigatory and law-enforcement bureaucracy in the twentieth century, the FCA's *qui tam* provisions have survived to this day. Indeed, as part of a general overhaul of the FCA in 1986, Congress expanded the ability of *qui tam* relators to enforce the statute.

In its lengthy history, the FCA has been frequently construed by the courts. At least two fundamental points have long been clear. *First*, the Act's *qui tam* enforcement mechanism seeks to protect the public fisc by creating a monetary incentive for private citizens to expose fraud against the Government. The Act therefore authorizes *qui tam* actions by "whistleblowers" who bring to light previously-undisclosed fraud, but *not* "parasitic" actions by relators who simply leech onto allegations of wrongdoing *already disclosed* by the Government or the news media. *Second*, the Act does not create an all-purpose cause of action for any violation of a contract, regulation, or statute by a government contractor; rather, it proscribes only *false claims* against the public fisc. As a matter of language and logic, a "claim" is not "false" if it requests money to which the claimant is entitled.

The opinion below challenges both of these settled points. Before reaching either point, however, the Ninth Circuit erred by holding that this action is governed by the FCA as amended in 1986, even though the conduct at issue here occurred before those amendments. The court then proceeded to reach the startling conclusion that the 1986 FCA amendments authorize employees of government contractors to bring "parasitic" *qui tam* actions based on information disclosed by the Government

during an audit or investigation. Finally, the court declared that a wholly technical noncompliance with accounting disclosure regulations, incapable of causing any injury to the public fisc, could nonetheless give rise to FCA liability. These holdings extend the False Claims Act far beyond all reasonable bounds, and leave government contractors exposed to endless litigation and open-ended liability.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 63 F.3d 1512 (1995) and reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at 1a-31a.

The District Court's unpublished orders denying Hughes' motions for dismissal and summary judgment based on the Act's bar against "parasitic" suits are reprinted at J.A. 196 and Pet. App. 34a-35a, respectively. The District Court's unpublished order granting summary judgment on the merits and its findings of fact and conclusions of law are reprinted at Pet. App. 36a-64a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 22, 1995. Hughes filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which the Ninth Circuit denied on November 17, 1995. *See* Pet. App. at 32a-33a. Hughes also filed a timely motion to stay issuance of the mandate pending the filing of a petition for certiorari, which the Ninth Circuit granted on November 29, 1995. *See* J.A. at 197. Hughes filed its petition for certiorari on February 15, 1996. This Court granted certiorari on October 15, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

As amended in 1986, the False Claims Act provides in pertinent part:

> Any person who—(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .

31 U.S.C. § 3729(a)(1), (2).

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A).

Between 1982 and 1986, the analogous provisions of the False Claims Act provided:

> A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and the costs of the civil action, if the person—(1) knowingly presents, or causes to be presented, to an officer or employee of the Government or a member of an armed force a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved.

31 U.S.C. § 3729(1), (2) (1982).

> Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

31 U.S.C. § 3730(b)(4) (1982).

STATEMENT OF THE CASE

A. The B-2 and F-15 Subcontracts

Petitioner Hughes Aircraft Company is in the business of developing and manufacturing aerospace and defense systems. Virtually all of its work is performed under contracts with, or subcontracts for the benefit of, the United States and foreign governments.

In December 1981, at the direction of the United States Air Force, the Northrop Corporation awarded Hughes a subcontract to design and develop a radar system for the B-2 ("Stealth") bomber that Northrop was then building under contract with the Air Force. *See* Pet. App. at 42a. Because the B-2 was an experimental aircraft, its development and production costs were difficult to predict. Accordingly, the subcontract (like the prime contract) provided for payment on a "cost-plus" basis: Northrop would reimburse Hughes for its costs plus a reasonable profit. *See id.* at 42a; J.A. at 29.

Several months later, the McDonnell Douglas Corporation awarded Hughes a subcontract to design and develop an upgraded radar system for the F-15 fighter aircraft that McDonnell Douglas was then building under contract with the Air Force. *See* Pet. App. at 43a-44a. In contrast to the B-2 agreement, the F-15 prime contract and subcontract provided for "fixed-price" compensation: McDonnell Douglas would

pay Hughes a set amount regardless of its costs. *See* J.A. at 29, 31.

As work on the two subcontracts progressed, it became apparent to the Air Force and Hughes that the projects overlapped in at least two material respects. *First*, both projects required the development of an advanced Radar Data Processor ("RDP") to identify and track other aircraft by analyzing target data. *See* Pet. App. at 44a-45a; *cf.* M. Skolnik, *Radar Handbook* at 1.5 (2d ed. 1990). *Second*, the radar of both aircraft called for an enhanced Analog Signal Converter ("ASC") to speed data processing by converting incoming radar signals from analog into digital format. *See* Pet. App. at 49a-50a, 52a; *cf. Radar Handbook* at 3.38-3.39.

Pursuant to proper accounting practices and federal regulation, *see* 32 C.F.R. § 15-201.4 (1982), Hughes was required to allocate the common costs of the RDP and ASC programs between the B-2 and F-15 subcontracts. Since 1978, Hughes had accomplished such allocations through "commonality agreements," internal memoranda specifying the allocation of common costs among multiple projects. *See* Pet. App. at 38a-39a; J.A. at 161. In December 1982, Hughes program managers signed a commonality agreement for the RDP project that allocated all initial development costs to the F-15 project and divided all subsequent upgrade costs evenly between the F-15 and B-2 programs. *See* Pet. App. at 46a. And in June 1983, Hughes program managers entered into a commonality agreement for the ASC project, providing that all common costs would be divided evenly between the F-15 and B-2 programs. *Id.* at 54a.[1]

---

[1] The Ninth Circuit incorrectly stated that Hughes charged all initial ASC development costs to the B-2 program. *See* Pet. App. at 3a. In fact, it is undisputed that Hughes allocated those costs evenly between the B-2 and F-15 programs. *See id.* at 54a-55a. (That is why, as the Government ultimately determined, Hughes' use of commonality accounting practices actually *saved* the Government money. *See infra* pp. 8-9.)

Hughes notified both the Air Force and Northrop of these commonality agreements, *see* Pet. App. at 47a-48a, 56a, and in 1984 filed with the Air Force a revised Cost Accounting Standards ("CAS") disclosure statement describing the accounting methods implemented in the agreements, *see id.* at 56a; J.A. at 16-19, 111. At the Government's request, Hughes later expanded the RDP and ASC commonality agreements to include yet another project—a radar upgrade for the F-14 fighter aircraft.[2]

B. The Government Audits

When, in the mid-1980s, the B-2 program began to experience a significant growth in costs, officials at Northrop expressed concern that Hughes might improperly have used its commonality accounting practices to shift costs from the fixed-price F-15 subcontract to the cost-plus B-2 subcontract. *See* J.A. at 23-27, 141. Accordingly, Northrop requested a government audit of Hughes' accounting practices. *See id.* at 20-22.

Pursuant to that request, the Government launched an investigation into Hughes' allocation of costs pursuant to the RDP and ASC commonality agreements. *See* J.A. at 30. After discussing the matter with employees of both Hughes and Northrop, *see id.*, the Air Force prepared a preliminary, classified audit in June 1986 concluding that Hughes had

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[2] In June 1984, at the direction of the United States Navy, the Grumman Aerospace Corporation awarded Hughes a subcontract to develop the radar system for an upgraded F-14 fighter known as the F-14D, and (again at the Navy's request) Hughes incorporated the advanced RDP and ASC technology into the F-14D. *See* Pet. App. at 56a-57a. Because the initial development phase of the RDP project had already ended, the revised RDP commonality agreement allocated common improvement and upgrade costs equally among the B-2, F-15, and F-14D programs. *See id.* at 58a-59a. The revised ASC commonality agreement specified that initial development costs would continue to be charged to only the B-2 and F-15 programs, while the costs of subsequent common upgrades would be divided evenly between all three programs. *See id.*

improperly billed the B-2 program for RDP and ASC development costs that should have been charged solely to the F-15 program. *See id.* at 29-32. The Defense Contract Audit Agency ("DCAA") then prepared a series of further unclassified audit reports from October 1986 to September 1988 challenging Hughes' allocation of the RDP and ASC costs. *See id.* at 33-38, 39-42, 59-65. In December 1987, the Government notified Hughes that it was directing Northrop to withhold $11.6 million under the B-2 subcontract as a result of the alleged accounting irregularities. *See id.* at 43-44.[3]

In addition to challenging Hughes' accounting practices, the DCAA auditors also challenged Hughes' *disclosure* of those accounting practices. *See* J.A. at 55-56, 62-63, 110-11. In particular, the final DCAA audit report concluded that the CAS disclosure statement that Hughes submitted to the Government did not adequately disclose the company's commonality accounting practices. *See id.* at 62-63.

During the investigatory process, government auditors met on numerous occasions with Hughes employees to discuss the alleged accounting improprieties. *See* J.A. at 64, 106-07, 159-60, 163, 169, 170, 172. The employees read and discussed the government audit reports, *see id.* at 161, 166, 172-74, and responded to the Government's inquiries, *see id.* at 162-63. Indeed, Hughes personnel prepared and distributed an internal "contact report" detailing the allegations at issue in the investigation and suggesting an appropriate response. *See id.* at 48-54, 169.

The Government ultimately concluded its investigation in November 1991. The six-year probe determined that—contrary to the Government's preliminary conclusions—Hughes' challenged accounting practices had not

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[3] As the investigation progressed, the Government directed Northrop to withhold an additional $3.8 million in payments under the B-2 subcontract. In total, $15.4 million in payments were withheld under that subcontract during the government investigation. *See* Pet. App. at 3a; J.A. at 162.

only complied with all applicable regulations, but actually had *benefitted* the Government by charging costs to the fixed-price F-15 program that otherwise would have been borne solely by the cost-plus B-2 program. *See* J.A. at 136-37. Accordingly, the Government (1) withdrew its earlier finding of noncompliance with respect to Hughes' accounting practices, (2) determined that any noncompliance with accounting disclosure requirements was immaterial, and (3) paid Hughes the $15.4 million previously withheld on the B-2 project. *See* Pet. App. at 67a-68a; J.A. at 136-37, 142-45.

C. The Schumer Complaint

The Government's final determination, however, did not end the dispute over Hughes' accounting practices. In September 1988, Hughes had denied a promotion to respondent William J. Schumer, previously the Division Contracts Manager of Hughes' B-2 division, and reassigned him to a different division. *See* J.A. at 88-89. In January 1989, Schumer (while still employed by Hughes) filed this action under the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. *See* J.A. at 69-82. Schumer's complaint parroted the allegations of accounting irregularities that were then the subject of the pending government investigation. *See id.* at 72-81. The complaint asserted that, as a result of these alleged irregularities, Hughes had overcharged the Government by $40 million. The complaint sought treble damages of $120 million. *See id.* at 81. (Schumer subsequently amended his complaint to allege an overcharge of $50 million and to request treble damages of $150 million. *See id.* at 102.)

Although the Government has the right to intervene in and conduct the prosecution of a *qui tam* action, *see* 31 U.S.C. § 3730(b)(2), it declined to do so here. *See* J.A. at 103-05.

D. The District Court Proceedings

Hughes moved to dismiss Schumer's complaint on three grounds. *First*, Hughes argued that the action was barred under the FCA as it existed at the time of the challenged conduct and

that the 1986 amendments to the statute, which relaxed the restrictions on *qui tam* lawsuits, did not apply retroactively. *Second*, Hughes argued that the action was barred even under the post-1986 version of the FCA, because Schumer was not a "whistleblower" with inside information, but rather a "parasitic" relator whose action was based on allegations disclosed by the Government during its extensive investigation and audits. *Third*, Hughes argued that the FCA's *qui tam* provisions, which deputize private parties to enforce the laws of the United States on behalf and in the name of the United States, are unconstitutional. The District Court (Pfaelzer, J., C.D. Cal.) summarily denied the motions in November 1990. *See* Pet. App. at 34a-35a.

Hughes subsequently moved for summary judgment on the merits as to all claims, and the District Court granted the motion in May 1992. Pet. App. at 36a-37a. In extensive findings, the District Court concluded that: (1) the RDP commonality agreement had properly allocated costs between the F-15 and B-2 programs, *id.* at 46a-49a; (2) the ASC commonality agreement had properly divided between the F-15 and B-2 programs costs that could have been charged to the B-2 program alone, *id.* at 50a; and (3) Hughes had disclosed the contents of the RDP and ASC commonality agreements to Northrop and the Air Force, *id.* at 46a-48a, 56a. Accordingly, the District Court concluded that "Schumer has not shown that Hughes violated the False Claims Act." *Id.* at 64a.

E. The Ninth Circuit Proceedings

Schumer appealed on the merits, and Hughes cross-appealed on the retroactivity and "parasitic" bar issues. The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. Pet. App. at 1a-31a.

The Court of Appeals first affirmed the District Court's conclusion that this action is governed by the post-1986 version of the FCA even though the challenged conduct took place prior to 1986. *See* Pet. App. at 5a-7a. The Ninth Circuit began its retroactivity analysis by noting that the 1986 FCA

amendments had, among other things, expanded the circumstances under which a *qui tam* relator could bring an FCA action. Whereas prior to 1986, the statute barred any *qui tam* action "based on evidence or information the Government had when the action was brought," 31 U.S.C. § 3730(b)(4) (1982), the 1986 amendments limited that bar to actions "based on the public disclosure of allegations or transactions" by the Government or the media, unless the relator was an "original source" of the information, 31 U.S.C. § 3730 (e)(4)(A). The Ninth Circuit acknowledged that, but for the 1986 amendments, this suit would be dismissed outright: "Since the government was aware of Schumer's allegations before he filed his suit, the pre-1986 rules would bar his claim." Pet. App. at 6a. Nonetheless, the court held that the 1986 amendment expanding a relator's ability to sue should be applied retroactively to suits based on pre-1986 conduct because the relevant FCA provision involved only the "subject matter jurisdiction" of courts to hear *qui tam* claims and did not affect the substantive liability of *qui tam* defendants. *Id.* at 6a-7a.

The Ninth Circuit then proceeded to announce an expansive interpretation of a *qui tam* relator's ability to sue under the post-1986 version of the FCA. According to the court, the 1986 amendments abandoned the traditional bar against "parasitic" *qui tam* actions and authorized employees of government contractors to file *qui tam* actions based on information disclosed by the Government during an audit or investigation. *See* Pet. App. at 8a-11a. Although the Act bars any *qui tam* suit "based upon the public disclosure of allegations" in a government audit or investigation, the court held that it would be "unrealistic" to construe government disclosure of information to a contractor's employees as "public disclosure." In the court's view, such employees (unlike other members of the public) have an economic incentive to suppress allegations of wrongdoing. *Id.* at 9a. Indeed, the court held that even disclosure to the employees of an innocent contractor (like Northrop) did not qualify as "public disclosure" because all defense contractors and their

employees "operate within a closed loop of secrecy." *Id.* Thus, the court held that Schumer was a proper *qui tam* relator, regardless of whether he was a "whistleblower" with inside information or instead had opportunistically based his action on allegations of wrongdoing disclosed in the government audits and investigation.

Turning to the merits, the Ninth Circuit affirmed the District Court's conclusion that Hughes' commonality accounting practices complied with applicable government regulations and properly allocated costs between the B-2 and F-15 programs. Pet. App. at 15a-19a (ASC costs), 21a-22a (RDP costs). Indeed, the court acknowledged that the challenged accounting practices had actually *saved* the Government money. *See id.* at 4a. Nonetheless, the Ninth Circuit held that Schumer had presented "genuine issues of material fact" under the FCA by challenging the adequacy of Hughes' *disclosure* of its proper accounting practices to Northrop, *id.* at 19a-22a, and to the Government, *see id.* at 22a-26a. Whether these alleged disclosure infractions were capable of injuring the public fisc, the Ninth Circuit declared, was immaterial. "[T]he lack of a determination of actual harm [from noncompliance with a disclosure obligation] does not preclude a claim under the FCA." *Id.* at 25a.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in three fundamental respects.

First, the court erred by applying the 1986 FCA amendments retroactively to authorize *qui tam* actions barred under the law in effect at the time of the wrongdoing alleged. But for those amendments, this action (which challenges pre-1986 conduct) would have been barred outright by virtue of the Government's prior knowledge of the underlying allegations. By relaxing the "government knowledge" bar to *qui tam* suits, the 1986 amendments necessarily increased legal burdens on *qui tam* defendants. Enforcement of the law by private parties as well as by the Government is substantially more burdensome than enforcement by the Government alone: private parties lack the

objective prosecutorial discretion of government law-enforcement officials because they are driven not by the public interest, but by personal ill will or desire for profit. Moreover, after the 1986 amendments, a government contractor could no longer avoid a *qui tam* action by disclosing potential irregularities to the Government. The fact that the amended version of the FCA employs the word "jurisdiction" does not reverse the traditional presumption against retroactivity; the amendment affects the *substantive* legal rights of FCA defendants by broadening the universe of FCA plaintiffs.

Second, the court erred by holding that the FCA permits employees of government contractors to file *qui tam* actions based on allegations disclosed by the Government during an audit or investigation. The FCA's *qui tam* provisions seek to encourage "whistleblowers" to expose previously-undisclosed allegations of fraud, not to spawn "parasitic" actions based on allegations already disclosed by the Government. A "public disclosure" within the meaning of the statute thus occurs when the Government reveals allegations of wrongdoing to a member of the public who is a stranger to the fraud.

Third, the court erred by holding that noncompliance with accounting *disclosure* regulations can give rise to FCA liability even where the underlying accounting practices themselves do not. The FCA does not proscribe any and all infractions by a government contractor: it proscribes only the submission of *false claims*. By definition, a "claim" is not "false" if the claimant is entitled to the money requested. Thus, an alleged infraction of a contract, statute, or regulation that does not result in an inflated "claim" against the public fisc simply cannot give rise to FCA liability.

ARGUMENT

I. THE 1986 FCA AMENDMENTS RELAXING THE RESTRICTIONS ON *QUI TAM* LAWSUITS DO NOT APPLY RETROACTIVELY.

The Ninth Circuit erred, as a threshold matter, by applying the 1986 FCA amendments retroactively to authorize *qui tam* actions barred under the law in effect at the time of the wrongdoing alleged. The conduct at issue in this case occurred exclusively before 1986. Under the pre-1986 version of the FCA, this action is barred outright by virtue of the Government's knowledge of the underlying allegations. *See* 31 U.S.C. § 3730(b)(4) (1982) ("[T]he court shall dismiss an action . . . based on evidence or information the Government had when the action was brought."). By relaxing that absolute bar, the amended version of § 3730 authorized *qui tam* actions that would have been precluded under prior law. Nothing in the 1986 amendments, however, indicates that Congress intended this change to authorize previously barred actions based on pre-1986 conduct. The 1986 FCA amendments (as the Ninth Circuit conceded) are silent on the issue of retroactivity. *See* Pet. App. at 6a.

Under basic tenets of statutory construction, thus, the amended version of § 3730 should not be applied retroactively in lawsuits challenging pre-1986 conduct. It is an elementary principle of jurisprudence that "[w]ords in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." *United States v. Heth*, 3 Cranch (7 U.S.) 399, 413 (1806). This Court emphatically reaffirmed that principle only three Terms ago in *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1497-1501 (1994). "[P]rospectivity remains the appropriate default rule," the Court declared, and a statute will not be given retroactive effect in the absence of "clear intent" by Congress. *Id.* at 1501.

Although the Ninth Circuit duly recited that rule, *see* Pet. App. at 6a, the court refused to apply it here for two basic reasons. *First*, the court suggested that the amended version of § 3730 was not truly retroactive with respect to pre-1986 conduct because expanding the opportunities for relators to bring FCA *qui tam* actions had no "deleterious effect" on FCA defendants' "substantive rights." *Id.* at 7a. *Second*, the court held that the 1986 amendment to § 3730 "altered subject matter jurisdiction rules," and thus fell within an "exception" to the general rule against retroactivity. *Id.* at 5a. Neither reason withstands scrutiny.

A. Application of Amended Section 3730 to Pre-1986 Conduct Is Impermissibly Retroactive.

At the outset of any retroactivity analysis, "the court must determine whether the new statute would have retroactive effect." *Landgraf*, 114 S. Ct. at 1505. A statute does not operate "retroactively" in any legally relevant sense simply because it affects antecedent conduct. *Id.* at 1499. Rather, the statute must "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 1505.

Although application of this analysis "is not always a simple or mechanical task," *id.* at 1498, this Court has specified that the central inquiry is "whether the new provision attaches new *legal* consequences to events completed before its enactment," *id.* at 1499 (emphasis added). *See also id.* at 1497 ("'The principle that the *legal effect* of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.'") (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)) (emphasis added). Laws that alter the *legal* consequences of past conduct have retroactive effect; laws that merely alter the *factual* consequences of such conduct do not.

An example from *Landgraf* makes the point: although "a new law banning gambling harms the person who had begun to construct a casino before the law's enactment," such a law has no retroactive effect with respect to the casino builder for the simple reason that it does not attach any new *legal* consequences to his past conduct. *See* 114 S. Ct. at 1499 n.24. Whether, as a *factual* matter, the builder is forced into bankruptcy is immaterial. If, in contrast, the new statute creates a private right of action for the violation of a building code, it would indeed operate retroactively if construed to authorize previously barred private lawsuits against the builder based on past construction.[4] A law that allows private parties to bring a legal action challenging past conduct necessarily attaches new legal consequences to that conduct.

For this reason, the 1986 amendments to § 3730 altered the legal consequences of an FCA defendant's pre-1986 conduct. The Ninth Circuit created a false dichotomy by declaring that the amended version of § 3730 "'did not alter [an FCA defendant's] underlying liability; it only altered the conditions under which a *qui tam* relator can bring an action to enforce that liability.'" Pet. App. at 7a (quoting *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1408 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1319 (1996)). If construed to authorize previously barred *qui tam* actions (like this one) challenging past conduct, the new statute self-evidently expands an FCA defendant's liability. Thus, for example, creation of a new private right of action for violation of a federal regulation imposes a substantial new burden upon the regulated party—even though the Government itself could

[4] Another way of analyzing the issue is to characterize a law as retroactive if it seeks to regulate past conduct. A new law banning gambling regulates the future conduct of gambling, not the past conduct of building casinos. A new law creating a private right of action to enforce building standards, in contrast, operates retroactively if applied to regulate the past conduct of casino-building. *See Landgraf*, 114 S. Ct. at 1526 n.3 (Scalia, J., concurring in judgment).

previously have enforced the regulation. Enforcement of the law by private parties as well as by the Government is substantially different, and more burdensome, than enforcement by the Government alone. That is why it is inappropriate to construe a statute creating a new private right of action to apply retroactively to past conduct. *See, e.g., Fagundez v. Oakland Raiders Prof. Football Club*, 498 F.2d 1394, 1395 (Temp. Emer. Ct. Apps. 1974); *cf. Rivera-Flores v. Puerto Rico Tel. Co.*, 64 F.3d 742, 751-52 (1st Cir. 1995); *Katzer v. Baldor Elec. Co.*, 969 F.2d 935, 940 (10th Cir. 1992).

This case is a sterling example of the point. The allegations of wrongdoing at issue here are wholly technical. The Government investigated those allegations at length and concluded that the alleged wrongdoing had actually *saved* the Government money. *See* Pet. App. at 4a; J.A. at 136. Not surprisingly, thus, the Government declined to intervene in this action. *See* J.A. at 103-05. Nonetheless, respondent Schumer has doggedly persisted. Private parties simply do not have the same incentives, or the same norms of prosecutorial discretion, as do public officials. Indeed, that is the fundamental justification for *qui tam* actions in the first place. *See, e.g., United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943). Attorneys representing *qui tam* relators have an ethical obligation zealously to serve their clients (*i.e.*, to maximize their monetary recovery), whereas attorneys representing the United States have an ethical obligation to ensure that justice is served. *See, e.g., Berger v. United States*, 295 U.S. 78, 88 (1935); *cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987).

The 1986 amendment to § 3730 expanding a government contractor's exposure to *qui tam* lawsuits "is also the type of legal change that would have an impact on private parties' planning." *Landgraf*, 114 S. Ct. at 1506. Prior to 1986, a government contractor could avoid a *qui tam* lawsuit by voluntarily disclosing actual or potential contract irregularities to the Government. *See* Waldman, *The 1986 Amendments to*

the False Claims Act: Retroactive or Prospective?, 18 Pub. Cont. L.J. 469, 481 (1989) ("Under the old law, a contractor could disclose the pertinent information about the fraud and foreclose the bringing of a claim by a relator."). The amendment of § 3730 eliminated this absolute "government knowledge" defense. A contractor's best efforts to avert a *qui tam* lawsuit by forthrightly addressing a problem could thus be rendered for naught. By narrowing the circumstances under which a contractor could foreclose a *qui tam* suit, the amendment of § 3730 impaired the contractor's substantive legal rights. *See, e.g., Winfree v. Northern Pac. Ry.*, 227 U.S. 296, 301 (1913) (elimination of material defense impairs substantive right). Thus, the provisions that govern an FCA *qui tam* suit "are those that were in effect at the time the conduct that is the subject of the litigation occurred." *United States v. TRW, Inc.*, 4 F.3d 417, 422-23 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1370 (1994).[5]

It is no answer to suggest, as has the Ninth Circuit, that a new law does not attach "new legal consequences" to past conduct when that conduct was already unlawful in the past. *See Lindenthal*, 61 F.3d at 1408 ("The amendment simply did not alter [the defendant's] underlying obligation not to commit fraud upon the government."). This Court confronted, and rejected, that precise argument in *Landgraf*. The *Landgraf* Court acknowledged that intentional employment discrimination had been unlawful for more than a generation, but insisted that the *extent*, as well as the *fact*, of liability is legally relevant. *See* 114 S. Ct. at 1506. "Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional

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[5] This Court has previously recognized that retroactive application of private enforcement actions to past conduct can disrupt settled regulatory expectations. Thus, in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60-61 (1987), the Court construed the citizen-suit provision of the Clean Water Act to apply prospectively only in light of settled understandings regarding government enforcement.

burdens based on conduct that occurred in the past." *Id.* at 1506 n.35. *See also Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510, 1515 (1994) (noting that statute can alter legal consequences of past conduct even where it does not purport to alter the "normative scope" of such conduct).

B. Retroactive Application of Amended Section 3730 Is Not Justified by the Presence of the Statutory Term "Jurisdiction."

The Ninth Circuit also attempted to justify its refusal to apply the venerable presumption against retroactivity by characterizing § 3730 as a limitation on judicial "subject matter jurisdiction," and hence "within an exception" to that presumption. Pet. App. at 5a-6a. The court's reasoning was remarkably wooden: a provision must be deemed "jurisdictional," and thus presumptively retroactive, if it uses the word "jurisdiction." *See id.* at 7a. That reasoning, and hence the court's conclusion, are fundamentally flawed.

It is true that this Court has generally applied statutes altering a court's subject-matter jurisdiction retroactively to cases involving pre-enactment conduct. *See Landgraf*, 114 S. Ct. at 1501-02. But that is not because such statutes use the magic word "jurisdiction," but because they typically do not affect the substantive rights of litigants. "Present law *normally* governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Id.* at 1502 (quoting *Republic Nat'l Bank v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)) (emphasis added). Because a litigant has no right to any particular tribunal, a new rule altering the subject-matter jurisdiction of a court "*usually* 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Landgraf*, 114 S. Ct. at 1502 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)) (emphasis added).

Thus, for example, in *Bruner v. United States*, 343 U.S. 112 (1952), this Court held that a new statute placing certain actions by federal employees within the exclusive jurisdiction

of the Court of Claims required dismissal of an action previously (and properly) filed in federal district court. "Congress has not altered the nature or validity of petitioner's rights or the Government's liability," the *Bruner* Court emphasized, "but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities." 343 U.S. at 117. *See also Hallowell*, 239 U.S. at 508 (noting that amended statute limiting federal-court jurisdiction over certain disputes involving allotment of Indian lands "takes away no substantive right, but simply changes the tribunal that is to hear the case"); *The Assessors v. Osbornes*, 9 Wall. (76 U.S.) 567, 572-75 (1869) (noting that repeal of federal-court jurisdiction over certain tax actions meant that such suits "must be commenced in the State courts").

These cases do not remotely establish the proposition that a court must mechanically apply any and every statutory provision using the word "jurisdiction" to pre-enactment conduct. That word is one of the most over-used in the legal lexicon, and encompasses a broad variety of meanings. "[J]urisdiction . . . is a many-hued term." *Peretz v. United States*, 501 U.S. 923, 953 (1991) (Scalia, J., dissenting) (internal quotation omitted). *See also Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n*, 781 F.2d 935, 945 n.4 (D.C. Cir. 1986) (R.B. Ginsburg, J., dissenting) (criticizing "profligate use of the term 'jurisdiction'" to mean many different things, and cautioning that indiscriminate use of the term "has all the tenacity of original sin and must constantly be guarded against"); *Rose v. Town of Harwich*, 778 F.2d 77, 79 (1st Cir. 1985) (noting "protean quality" of word "jurisdiction") (Breyer, J.), *cert. denied*, 476 U.S. 1159 (1986).

This case does not fall within the line of cases in which this Court has retroactively applied statutes altering judicial subject-matter jurisdiction. The 1986 amendments to § 3730 are substantive in nature: they expanded the power of *qui tam* relators to file private FCA enforcement actions in order to

expose and deter fraud against the Government. The amended version of § 3730 would be no different if phrased, "A relator may not bring an action based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing . . . ."[6] Congress routinely expresses substantive limitations in jurisdictional terms.[7] Accordingly, this provision is no more "jurisdictional" than one specifying: "A court shall have jurisdiction to award punitive damages in any case involving intentional employment discrimination." *Cf. Landgraf*, 114 S. Ct. at 1505-06 (holding that availability of punitive damages is substantive change that does not apply retroactively in the absence of clear intent). It is not the word "jurisdiction," but the substantive scope of the statute, that is dispositive.

Indeed, it is far from clear whether the word "jurisdiction" in § 3730 defines a court's subject-matter jurisdiction at all. As the Seventh Circuit (per Judge Easterbrook) has noted, the "adjudicatory power" of the court "is conferred by §§ 1331, 1345, and 3732(a) rather than 'this section' (sec. 3730)." *United States ex rel. Fallon v. Accudyne Corp.*, 97 F.3d 937, 941 (7th Cir. 1996). Section 3730 "does not curtail the categories of disputes that may be resolved (a real 'jurisdictional' limit) but instead determines who may speak for the United States on a subject, and who if anyone gets a financial reward." *Id.* Notwithstanding its use of the term "jurisdiction," in other words, § 3730 simply does not "speak to the power of the court." *Landgraf*, 114 S. Ct. at 1502

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[6] Indeed, the statutory subsection immediately preceding the provision at issue here is phrased in precisely this way. *See* 31 U.S.C. § 3730(e)(3) ("In no event may a person bring an action . . . which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.").

[7] *See, e.g.*, 25 U.S.C. § 1772f(b) ("[T]he court shall not have jurisdiction to award money damages against the State, the district or the tribe."); 26 U.S.C. § 7426(b) ("The district court shall have jurisdiction to grant only the following forms of relief . . . .").

(internal quotation omitted). That power is conferred by the provision of the FCA that *does* govern the court's subject-matter jurisdiction, 31 U.S.C. § 3732 ("False Claims Jurisdiction"). *See Fallon*, 97 F.3d at 940 ("§ 3732(a) grants subject-matter jurisdiction for false-claims suits—as if that were needed in light of the general grant of federal-question jurisdiction, 28 U.S.C. § 1331, and the special grant of jurisdiction for civil litigation in which the United States is the plaintiff, 28 U.S.C. § 1345.").

In the final analysis, the situation here is materially indistinguishable from the situation in which a new law either shortens or lengthens a statute of limitations. In a loose sense, such a change can be characterized as "jurisdictional," since it either precludes or authorizes invocation of a court's jurisdiction. It is well-established, however, that an amended statute of limitations should not be applied retroactively if the effect would be either (in the case of lengthened limitations period) to revive an action previously barred or (in the case of a shortened limitations period) to bar an action previously authorized. *See, e.g., United States v. St. Louis, S.F. & T. Ry.*, 270 U.S. 1, 3 (1926) (Brandeis, J.); *Fullerton-Krueger Lumber Co. v. Northern Pac. Ry.*, 266 U.S. 435, 437 (1925); *Herrick v. Boquillas Land & Cattle Co.*, 200 U.S. 97, 101-02 (1906); *Sohn v. Waterson*, 17 Wall. (84 U.S.) 596, 598-99 (1873). Because the amended version of § 3730 authorizes actions that were previously barred, it should not be applied retroactively. Although it is not *per se* unconstitutional for Congress to revive a previously barred claim, *see Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 311-16 (1945), such an "outcome is sufficiently unusual that the legislature should say so pretty clearly before a court will conclude that the statute produces this effect." *United States v. Kimberlin*, 776 F.2d 1344, 1347 (7th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986).[8]

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[8] On several occasions in recent years, bills have been introduced in (continued...)

II. THE 1986 FCA AMENDMENTS DO NOT AUTHORIZE "PARASITIC" *QUI TAM* ACTIONS BASED ON INFORMATION DISCLOSED BY THE GOVERNMENT.

Even assuming that the post-1986 version of § 3730 applies retroactively to pre-1986 conduct, the Ninth Circuit fundamentally misconstrued the statute. The whole point of the FCA's *qui tam* provisions is to encourage "whistleblowers" to expose previously-undisclosed fraud against the Government, not to create a windfall for "parasitic" plaintiffs who learn of allegations of fraud disclosed by the Government or the news media. The amended version of § 3730 thus expressly bars *qui tam* suits based upon the "public disclosure" of allegations by the Government or the media.

The Ninth Circuit, however, essentially wrote the "public disclosure" provision out of the statute by holding that it does not apply to employees of government contractors. According to the Ninth Circuit, a government disclosure to a contractor's "innocent employees" (*i.e.*, those not involved in an alleged fraud) cannot *as a matter of law* qualify as a "public disclosure." *See* Pet. App. at 8a-11a. The court's rationale was explicitly policy-based: "Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure." *Id.* at 9a. The Ninth Circuit thus rejected Hughes'

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[8] (...continued)
Congress that would specifically direct courts to apply the 1986 FCA amendments retroactively. *See, e.g.*, S. 841, 103d Cong., 1st Sess. § 8(b)(1) (1993); H.R. 2915, 103d Cong., 1st Sess. § 8(b)(1) (1993); H.R. 4563, 102d Cong., 2d Sess. § 6(b)(1) (1992). None was enacted into law. Although the failure of these bills is scarcely conclusive on the meaning of the 1986 amendments, it underscores that Congress is perfectly capable of drafting explicit language on retroactivity. This Court should not hand the proponents of retroactivity a victory they failed to achieve in the Legislature. *See, e.g., Landgraf*, 114 S. Ct. at 1491-92.

argument that this action should be dismissed because it is based on information disclosed by the Government's mid-1980s investigation and audits of Hughes' commonality accounting practices.

The Ninth Circuit's holding that the FCA authorizes "parasitic" *qui tam* actions by a contractor's employees conflicts not only with the statute's text, structure, purpose, and history, but with common sense.

A. The "Public Disclosure" Provision Preserves the Traditional Bar Against "Parasitic" *Qui Tam* Actions.

As in any case involving statutory interpretation, the starting point here is the text of the statute. *See, e.g., Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Unfortunately, the relevant language is hardly a model of artful drafting. *See, e.g.*, J. Boese, *Civil False Claims and Qui Tam Actions* 4-32 (1995 Supp.) (describing statutory text as "imprecise and at times contradictory"). In pertinent part, the statute bars *qui tam* actions

> based upon the *public disclosure* of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media unless . . . the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A) (emphasis added). In determining whether this provision bars a particular action, the threshold question is whether there has been a "public disclosure" of the underlying allegations or transactions.[9]

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[9] Because the Ninth Circuit held as a matter of law that no "public disclosure" had occurred here, it did not reach the further questions (1) whether this action is "based upon" any such disclosure, or (2) whether Schumer was an "original source" of the information disclosed. *See* Pet. (continued...)

The term "public disclosure" is neither defined in the statute nor a term of art with an established common law meaning. *Cf. Morissette v. United States*, 342 U.S. 246, 263 (1952). Its meaning, thus, must be derived from ordinary English, as informed by the structure, purpose, and history of the statute. *See, e.g., Brotherhood of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe R.R.*, 116 S. Ct. 595, 598, 600 (1996); *United States v. Board of Comm'rs*, 435 U.S. 110, 117-18 (1978).

Viewed in isolation, the term "public disclosure" is susceptible to a range of plausible meanings, from disclosure to the *general* public to disclosure to *some member* of the public. The statute, however, provides important context. Section 3730 refers not to "public disclosure" in the abstract, but to public disclosure of "allegations or transactions" in (1) "a criminal, civil, or administrative hearing," (2) "a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation," or (3) "the news media." 31 U.S.C. § 3730(e)(4)(A). It is readily apparent that not all of these means of disclosure entail dissemination to the general public. A government "audit" or "investigation" typically remains unknown and indeed incomprehensible to all but a few members of the public. "[T]he news media," in fact, is the *only* listed means of disclosure that would likely succeed in making particular "allegations or transactions" known to the public at large.

In context, then, it seems clear that "public disclosure" takes place either when the Government discloses allegations or transactions to some member of the public in the course of an investigatory or enforcement action, or when the news media disseminates such information to the public at large. Because the employees of a government contractor are undoubtedly members of the public, they are barred under § 3730 from

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[9] (...continued)
App. at 14a.

filing "parasitic" *qui tam* actions based on information disclosed by the Government in an investigation or audit. *See, e.g., United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322 (2d Cir. 1992) ("public disclosure" occurs whenever Government "actually divulge[s]" an alleged fraud to "strangers to the fraud," including a contractor's "innocent employees"). "[T]here is no reason to distinguish between [a contractor's] employees and any private citizen to whom a copy of a government investigative report is 'leaked.' . . . [T]he person is a member of the general public (*i.e.*, not a government official), so the disclosure is a public one." Vogel, *Eligibility Requirements for Relators Under Qui Tam Provisions of the False Claims Act*, 21 Pub. Cont. L. J. 593, 606 (1992).[10] "Once allegations of fraud are revealed to members of the public with no prior knowledge thereof, the government can no longer throw a cloak of secrecy around the allegations; they are irretrievably released into the public domain." *Doe*, 960 F.2d at 323.[11]

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[10] *See also* Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 Pub. Cont. L. J. 237, 262 (1995) ("[I]nformation [is] public if it reaches a single individual (a 'stranger to the fraud').").

[11] Indeed, Congress is perfectly capable of specifying, if it so wishes, that "public disclosure" must entail disclosure to the *general* public. In 1992, a bill was introduced in the House of Representatives that would have amended § 3730(e)(4) to provide: "No court shall have jurisdiction over an action . . . in which all of the material facts and allegations are obtained from a news media report or reports, or a disclosure to the *general public* of a document or documents (i) created by the Federal Government; (ii) filed in a lawsuit to which the Federal Government is a party; or (iii) relating to an open and active investigation by the Federal Government; unless the person bringing the action is an original source of such facts and allegations." H.R. 4563, 102d Cong., 2d Sess. § 3 (1992) (emphasis added). That bill, however, was not enacted. As noted above, *see supra* n.8, the proponents of expanded *qui tam* jurisdiction should not be handed in court a victory that eluded them in Congress.

This contextual interpretation of "public disclosure" strongly comports with the provision's purpose and history. *Cf. John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993) (statutory interpretation "guided not by a single sentence or member of a sentence, but look[s] to the provisions of the whole law, and to its object and policy") (internal quotation omitted). The FCA has formed part of the U.S. Code for more than a century; its past interpretation and application provide important guidance to the meaning of the 1986 amendments. "The past serves as prologue; some familiarity with th[e] tortuous, wending history [of the FCA] is critical to an understanding of the latest set of amendments to the *qui tam* provisions." *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994); *see also United States ex rel. S. Prawer & Co. v. Fleet Bank*, 24 F.3d 320, 324-26 (1st Cir. 1994).

During the eighty years following the FCA's enactment during the Civil War, no court ever held that the Act authorized a *qui tam* relator to bring a lawsuit based on information obtained from the Government. Indeed, in no reported case did a litigant even advance such a theory. In 1943, however, this Court upset the settled understanding of *qui tam* jurisdiction by holding in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, that the plain language of the 1863 Act authorized "parasitic" *qui tam* actions based on information copied from a criminal indictment.[12] Justice Jackson, in dissent, conceded that the Court's interpretation was consistent with the Act's literal terms, *see* 317 U.S. at 556-57, but noted that "[n]ever until now has the bar dreamed that it permitted such use," *id.* at 559. "If the statute has all these eighty years authorized this sort of proceeding, the legal profession of the United States has been

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[12] The 1863 statute contained a broad *qui tam* provision authorizing "any person" to prosecute a claim on behalf and in the name of the United States "against any person who knowingly submitted a false claim to the Government." *See* Act of March 2, 1863, ch. 67, 12 Stat. 696.

strangely unresponsive to a Congressional proffer of windfall income." *Id.* (dissenting opinion).

In the wake of this Court's decision, Congress swiftly amended the FCA to make explicit what had always been implicit: the Act's *qui tam* provisions were intended to create an incentive for "whistleblowers" to bring fraud to light, not a windfall for "parasitic" relators. As amended in 1943, the statute expressly precluded *qui tam* actions "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." *See* Act of Dec. 23, 1943, Pub. L. No. 213, ch. 377, 57 Stat. 608.[13]

Congress revisited the FCA in the mid-1980s to address what it saw as two shortcomings of the 1943 amendment: by its terms, that amendment precluded *qui tam* actions even when (1) the would-be relator was the source of the Government's prior knowledge, *see, e.g.*, *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1104-06 (7th Cir. 1984); *United States ex rel. Pettis v. Morrison-Knudsen Co.*, 577 F.2d 668, 671-73 (9th Cir. 1978), and (2) the Executive Branch had done absolutely nothing with respect to the allegations of wrongdoing, *see, e.g.*, *United States ex rel. Lapin v. International Business Machines Corp.*, 490 F. Supp. 244, 247 (D. Haw. 1980). Accordingly, as part of a general overhaul of the FCA in 1986, Congress relaxed the statutory restrictions on *qui tam* relators.[14] The amended version of § 3730 replaced the

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[13] Congress modified the wording of this provision in 1982 to preclude *qui tam* actions "based on evidence or information the Government had when the action was brought." *See* Act of Sept. 13, 1982, Pub. L. No. 97-258, 96 Stat. 978. The 1982 amendment was intended to "restate" the previous provision "without substantive change." H.R. Rep. No. 651, 97th Cong., 2d Sess. 1 (1982).

[14] The 1986 amendments also sought to encourage *qui tam* actions by extending the statute of limitations, *see* 31 U.S.C. § 3731, reducing the *scienter* requirement, *id.* § 3729(b), lowering the burden of proof, *id.*

(continued...)

1943 "government knowledge" bar with the "public disclosure" bar at issue here, and explicitly authorized the "original source" of the disclosed information to sue. *Compare* 31 U.S.C. § 3730(b)(4) (1982) *with* 31 U.S.C. § 3730(e)(4) (1986).

By replacing the "government knowledge" bar with the "public disclosure" bar, however, Congress in no way repudiated the traditional understanding that the FCA's *qui tam* provisions are meant to encourage "whistleblowers" to expose previously-undisclosed fraud. Rather, the amendment sought to ensure that government *inaction* with respect to particular allegations of fraud would not have the effect of barring a *qui tam* suit involving those allegations. *See Doe*, 960 F.2d at 323.[15] Thus, the "public disclosure" provision barred *qui tam* actions based on allegations or transactions disclosed in the course of affirmative investigatory or law-enforcement efforts by the Government. The various means of government disclosure set forth in § 3730(e)(4) underscore this point—they indicate that the Government is "on the trail of the alleged fraud without [the relator's] assistance." *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995). Under these circumstances, a *qui tam* action based on a government disclosure would serve no useful purpose.

The "original source" provision in the amended version of § 3730 further underscores Congress' intent to enlist "the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity." S. Rep. No. 345, 99th Cong., 2d Sess. 4 (1986). To qualify as an "original source" of information that has been publicly disclosed, a

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(...continued)

§ 3731(c), increasing the statutory penalties, *id.* § 3729(a), and increasing the bounty available to *qui tam* relators, *id.* §§ 3730(d)(1) & (2).

[15] Under the pre-1986 version of § 3730, an action was deemed to be "based on" evidence or information in the Government's possession (and thus barred) if it involved subject matter known to the Government, even where the relator did not derive the evidence or information from the Government. *See, e.g.*, *Dean*, 729 F.2d at 1103-04; *Pettis*, 577 F.2d at 674.

relator must have had "*direct* and *independent* knowledge of th[at] information." 31 U.S.C. § 3730(e)(4)(B) (emphasis added). Almost by definition, such "direct" and "independent" knowledge of fraud will be limited to those with firsthand knowledge of the alleged fraud. *See, e.g., United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703 (8th Cir. 1995); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160-61 (3d Cir. 1991).

The 1986 amendments to § 3730 thus sought to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Springfield Terminal*, 14 F.3d at 649.[16] In light of those amendments, the mere existence of incriminating information in government files would no longer bar a *qui tam* action involving that same information, but government disclosure of the information to a member of the public in the course of an investigation would bar the suit (unless the relator was an "original source" with "direct" and "independent" knowledge of the information). *See, e.g.*, Boese, *Civil False Claims*, at 4-36 (public disclosure

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[16] *See also United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1511 (8th Cir. 1994) ("The Act's jurisdictional scheme is designed to promote private citizen involvement in exposing fraud against the government, while at the same time prevent parasitic suits by opportunistic late-comers who add nothing to the exposure of the fraud."), *cert. denied*, 115 S. Ct. 2579 (1995); *United States ex rel. Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562, 565 (11th Cir. 1994) *(per curiam)* ("The 1986 amendments were intended to increase private citizen involvement in exposing fraud against the government while preventing opportunistic suits by private persons who heard of fraud but played no part in exposing it."); *United States ex rel. Precision Co. v. Koch Inds.*, 971 F.2d 548, 552 (10th Cir. 1992) (noting that § 3730(e)(4) "has two basic goals: (1) to encourage private citizens with first-hand knowledge to expose fraud; and (2) to avoid civil actions by opportunists attempting to capitalize on public information without seriously contributing to the disclosure of the fraud"), *cert. denied*, 507 U.S. 951 (1993).

by the Government "implies a positive act taken with intent to disclose, *i.e.*, something more than mere preparation of documentation regarding fraud").

The "public disclosure" provision, in other words, preserves the FCA's traditional distinction between "whistleblower" and "parasitic" actions. *See, e.g., Federal Recovery Servs., Inc. v. United States*, 72 F.3d 447, 452 (5th Cir. 1995) (§ 3730(e)(4) "prevent[s] parasitic suits based on information discovered by others"); *Hindo v. University Health Sciences/The Chicago Medical School*, 65 F.3d 608, 612-13 (7th Cir. 1995) (§ 3730(e)(4) "permits only [an] insider/'whistleblower' to maintain the *qui tam* action"), *cert. denied*, 116 S. Ct. 915 (1996); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347 (4th Cir.) (1986 FCA amendments "sought to prevent 'parasitic' *qui tam* actions"), *cert. denied*, 115 S. Ct. 316 (1994); *Springfield Terminal*, 14 F.3d at 651 (1986 FCA amendments "left in place barriers to parasitic lawsuits"); *Stinson*, 944 F.2d at 1161 (§ 3730(e)(4) "insures that suits decried as copycat or parasitic . . . will not clog the courts").[17]

This interpretation of the "public disclosure" bar has the virtue of comporting with common sense. "*Qui tam* suits are meant to encourage insiders privy to a fraud on the Government to blow the whistle on the crime. In such a scheme, there is little point in rewarding a second toot." *Wang*

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[17] Commentators, as well as courts, have underscored this point. *See, e.g.*, Vogel, *The Public Disclosure Bar Against Qui Tam Suits*, 24 Pub. Cont. L.J. 477, 510 (1995) ("[T]he final version of [§ 3730(e)(4)] bars purely parasitic relators from going forward under any circumstances."); Comment, *Qui Tam Suits Under the False Claims Amendments of 1986: The Need for Clear Legislative Expression*, 42 Cath. U. L. Rev. 935, 953 (1993) ("The . . . language [of § 3730(e)(4)] reflects congressional intent that parasitic suits should remain forbidden."); Oparil, *The Coming Impact of the Amended False Claims Act*, 22 Akron L. Rev. 525, 549 (1989) ("Clearly, the purpose of [§ 3730(e)(4)] was to retain the 1943 Amendment's bias against parasitic lawsuits.").

v. FMC Corp., 975 F.2d 1412, 1419 (9th Cir. 1992). At least where the Government has undertaken active steps to investigate particular allegations of wrongdoing, a "parasitic" action affirmatively *injures* the public fisc by diverting a portion of the potential recovery from the Government's coffers to a *qui tam* relator who by definition has added nothing of value. *See, e.g., Springfield Terminal*, 14 F.3d at 649 (noting that § 3730(e)(4) is designed to prevent "parasitic exploitation of the public coffers").

"Parasitic" actions, indeed, present all of the drawbacks of ordinary *qui tam* actions without the corresponding benefit of exposing fraud. In particular, they can jeopardize subsequent criminal proceedings. As Justice Jackson warned over half a century ago: "[T]he trial of a criminal case can be wrecked by pre-trial of the issues on the civil side of the court, particularly if the civil trial is conducted by those not interested in the criminal prosecution." *Marcus*, 317 U.S. at 560-61 (dissenting opinion). *See also id.* at 561 ("By trial, by taking of depositions, by other devices, the informer may force the premature disclosure of the Government's case."). And where, as here, the Government conducts a lengthy investigation into particular allegations of wrongdoing and turns up nothing, "parasitic" *qui tam* actions are nothing but an instrument of harassment used to extort a lucrative settlement.

Interpreting the FCA's "public disclosure" bar to preclude "parasitic" *qui tam* actions by members of the public also has the virtue of comporting with the canon that statutes phrased in virtually identical terms should be interpreted alike. *See, e.g., Northcross v. Board of Educ.*, 412 U.S. 427, 428 (1973) *(per curiam)*. In 1989, three years after enacting the "public disclosure" bar at issue here, Congress authorized the Attorney General to reward "whistleblowers" in criminal cases involving "major fraud" against the Government with cash payments of up to $250,000—except, *inter alia*, where "the furnished information is based upon public disclosure of allegations or transactions" by the Government or news media, unless the

informer is an "original source of the information." *See* 18 U.S.C. § 1031(g)(1), (2)(C). Here, as in the FCA, it is quite obvious that "public disclosure" does not require disclosure to the *general* public. It is unlikely, to say the least, that Congress intended to authorize payment of cash awards to "parasitic" informers.[18]

The legislative history of the 1986 FCA amendments also supports the commonsense conclusion that Congress did not intend to authorize "parasitic" *qui tam* actions. Indeed, the relevant Committee Reports are chock-full of statements reaffirming the FCA's traditional purpose of "encourag[ing] any individual knowing of Government fraud to bring that information forward." S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986). *See also* H.R. Rep. No. 660, 99th Cong., 2d Sess. 23 (1986) ("The purpose of the *qui tam* provisions of the False Claims Act is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward.").

In particular, the legislative history underscores that the 1986 replacement of the "government knowledge" bar with the "public disclosure" bar was not intended to authorize "parasitic" *qui tam* actions. The relevant Committee Reports fault the 1943 "government knowledge" bar for having precluded *qui tam* actions involving alleged wrongdoing about which the Government had done *nothing* by way of

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[18] Other sections of the U.S. Code also refer to the public disclosure of information to *particular members* of the public rather than to the *general* public. *See, e.g.*, 8 U.S.C. § 1534(e)(1)(C), 50 U.S.C. § 1806(c) (Government need not disclose information obtained by electronic surveillance either to criminal defendant or court if such "public disclosure" would pose a risk to national security); 42 U.S.C. § 1396t(i)(5) ("The State shall provide for public disclosure of findings under this paragraph *upon request*") (emphasis added); *cf. GTE Sylvania*, 447 U.S. at 108-09 (disclosure to *any* member of the public under the Freedom of Information Act is "most accurately characterized as a 'public disclosure' within the plain meaning of [a provision of the Consumer Product Safety Act]").

investigation or disclosure. "The Committee recognizes the validity of the reasons for enactment of the 1943 amendments. Nevertheless, the Committee is concerned that there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took *no action*." H.R. Rep. No. 660 at 22-23 (emphasis added). *See also* S. Rep. No. 345 at 12-13 ("Courts have also found the jurisdictional bar to apply even if the Government makes *no effort* to investigate or take action after the original allegations were received.") (citing *United States ex rel. Lapin v. International Business Machines Corp.*, 490 F. Supp. 244 (D. Haw. 1980)) (emphasis added). Congress addressed this concern in 1986 by limiting the bar to situations in which the Government disclosed the information in a manner that established that it had not abdicated its law-enforcement responsibilities.[19]

B. The Ninth Circuit Erred by Holding that the FCA Authorizes "Parasitic" *Qui Tam* Actions by a Government Contractor's "Innocent Employees."

It follows from the foregoing that the Ninth Circuit erred by holding that the amended version of § 3730 authorizes "innocent employees" of government contractors to file "parasitic" *qui tam* actions based on allegations or transactions disclosed in a government audit or investigation. *See* Pet. App. at 8a-11a. The Ninth Circuit did not deny that such employees are members of the "public," nor did it otherwise seek to ground its holding in the text of the statute. Rather, the court

[19] The legislative history of the 1986 FCA amendments may be most notable for what it does *not* say. Nowhere in that extensive history is there any suggestion that Congress sought to overturn the bedrock distinction between "whistleblowers" and "parasites." It is unlikely, to say the least, that Congress would have altered the statutory scheme in such a fundamental (and counter-intuitive) manner without any explanation or explicit recognition. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 284 n.13 (1974) ("If Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly.").

explicitly based its interpretation of § 3730 on *policy* grounds. According to the Ninth Circuit, it is "unrealistic" to expect "innocent employees" to bring *qui tam* actions against their employers (or, for that matter, *other* government contractors), and thus a government disclosure to such employees "does not trigger the potential for corrective action presented by other forms of disclosure." *Id.* at 9a. That argument has no basis in law or fact, and reveals a fundamental misunderstanding of the statute.

The FCA authorizes private parties to bring *qui tam* actions for the very *purpose* of encouraging insiders to expose fraud that would otherwise go undetected. Far from being "unrealistic" *qui tam* plaintiffs, Pet. App. at 9a, the employees of government contractors are in fact the "paradigm" relators. *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 742 (9th Cir. 1995) *(en banc)*, *cert. denied*, 116 S. Ct. 1877 (1996); *Wang*, 975 F.2d at 1419; *cf.* Boese, *Civil False Claims*, at 4-9 ("The most common *qui tam* plaintiff is the current employee."); *id.* at 4-10 ("The second most common *qui tam* plaintiff is the former employee."). Indeed, that is why the FCA's *qui tam* provisions afford comprehensive protection for "whistleblowing" employees. *See* 31 U.S.C. § 3730(h).[20] Members of the general public simply do not have the inside knowledge necessary to expose fraud by government contractors. Accordingly, the Ninth Circuit's core assumption—that an innocent employee is unlikely to bring a *qui tam* action for fear "that her job may be in jeopardy," Pet. App. at 9a—is not only speculative but fanciful.

In any event, the government investigation and audits in this case were disclosed not only to *Hughes*' employees, but also to

[20] "Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under [the FCA] . . . shall be entitled to all relief necessary to make the employee whole."

Northrop's. *See, e.g.*, J.A. at 30. The Ninth Circuit breezily dismissed that point by asserting that all defense contractors and their employees "operate within a closed loop of secrecy." Pet. App. at 9a. This assertion too is baseless: Even if employees were chilled from blowing the whistle on their *own* employers, there is no reason to suppose that they would be chilled from blowing the whistle on *other* employers. To the contrary, prime contractors have a strong financial incentive to ensure that their subcontractors do not overcharge. Indeed, in this very case, it was Northrop employees who launched the government investigation of Hughes' accounting practices. *See* J.A. at 20-22.

The Ninth Circuit also expressed a belief that "curtail[ing] the ability of insiders to bring suit once the government becomes involved in the matter," Pet. App. at 10a, would be "contrary to the intent of the statute," *id.* at 11a. Not so. The court flatly ignored the FCA's fundamental distinction between "whistleblowers" and "parasites." "A whistleblower sounds the alarm; he does not echo it." *Wang*, 975 F.2d at 1419. The FCA seeks to encourage insiders to bring suit *before* the Government takes affirmative steps to investigate or prosecute a particular allegation of wrongdoing. An insider who files an action based on allegations disclosed in the course of a government audit or investigation is precisely the kind of opportunistic relator whom the "public disclosure" bar sought to keep out of court.

The Ninth Circuit's interpretation of the statute, moreover, has staggering practical implications. The Government routinely audits its contractors and investigates potential contract irregularities. Such audits and investigations almost invariably require contact between government personnel and a contractor's employees. Under the Ninth Circuit's rule, such employees are always free to file *qui tam* actions based on information thereby disclosed by the Government. The amounts of money at stake are often breathtaking (Schumer, for instance, sought *$150 million* in this case), and the FCA

provides the employee with ironclad protection against retaliation. Needless to say, the temptation to file *qui tam* suits is particularly strong among employees who are otherwise disgruntled (Schumer, for instance, had been passed over for promotion months *before* he filed this action). Thus, if the Ninth Circuit's rule is upheld, every government audit or investigation can be expected to spin off its own "parasitic" *qui tam* action.[21] Random employees (and their lawyers) may thereby become rich, but only by diverting money from the public fisc.

It is, of course, possible for Congress to enact laws that defy common sense in this manner. This Court, however, should not lightly presume that Congress has done so. *See, e.g., Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-28 (1989) (Scalia, J., concurring); Breyer, *Justice Lester W. Roth Lecture*, 65 S. Cal. L. Rev. 845, 848 (1992) (statutes should not be construed in a manner "manifestly contrary to common reason"). Accordingly, the Ninth Circuit's implausible interpretation of § 3730 should be rejected.

III. A "FALSE CLAIM" UNDER THE FCA MUST BE CAPABLE OF INJURING THE PUBLIC FISC.

Perhaps the most startling aspect of the decision below is the Ninth Circuit's conclusion that Schumer was entitled to a trial on the merits under the FCA based solely on his challenge to the adequacy of Hughes' *disclosure* of its accounting practices to the Government and Northrop. *See* Pet. App. at 19a-20a, 25a-26a. Schumer's challenge to the underlying accounting practices, the court acknowledged, did not present any genuine

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[21] The Ninth Circuit acknowledged this possibility, but shrugged it off on the ground that a contractor would face only "a single lawsuit in each instance, since the first filing would constitute public disclosure sufficient to bar other claims based upon the audit." Pet. App. at 11a. That observation, of course, offers scant reassurance to government contractors, and simply encourages a race to the courthouse among opportunistic employees hoping to capitalize on adverse government findings.

issue of material fact; commonality accounting is not only proper, but in this case actually *saved* the Government money. *See* Pet. App. at 15a-19a (holding that the allocation of one-half of the ASC development costs to the B-2 program was proper); *id.* at 21a-22a (holding that Schumer "provide[d] no authority" for his contention that Hughes' division of common RDP upgrade costs between the B-2 and F-15 projects was improper); *id.* at 4a (acknowledging that Hughes' accounting methods saved the Government money). The court declared, however, that a wholly technical noncompliance with accounting disclosure regulations can nonetheless give rise to liability under the FCA. "[T]he lack of a determination of actual harm [from the disclosure deficiencies] does not preclude a claim under the FCA." *Id.* at 25a.

The Ninth Circuit thereby revealed a fundamental misunderstanding of the FCA's substantive scope. The statute, as its name suggests, proscribes *false claims* against the Government. It is not a code of procedural regularity in government contracting. It does not create an all-purpose cause of action for the violation of any statute or regulation. Unless an FCA plaintiff (either a *qui tam* relator or the Government) can identify a "claim" for government money that is "false," there is simply no cause of action under the statute. Because the purely technical noncompliance with accounting disclosure regulations at issue here did not relieve the Government of its obligation to pay any claim, it cannot, as a matter of law, give rise to FCA liability.

A. The FCA Proscribes Pecuniary Frauds Against the Public Fisc.

The FCA defines a "claim," in relevant part, as a "request or demand, whether under a contract or otherwise, for money or property." 31 U.S.C. § 3729(c). That definition comports with the term's ordinary meaning: a "claim" is commonly understood as "a demand for compensation, benefits, or payment." Webster's Third New International Dictionary 414 (1976). *Accord United States v. McNinch*, 356 U.S. 595, 599 (1958);

United States v. American Heart Research Found., Inc., 996 F.2d 7, 9-10 (1st Cir. 1993). A false claim, thus, necessarily entails a request for money or property to which the claimant is not entitled.

The FCA's focus on "claims" reflects its fundamental purpose of "protect[ing] the treasury against the hungry and unscrupulous host that encompasses it on every side." *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885). *See also Rainwater v. United States*, 356 U.S. 590, 592 (1958) ("It seems quite clear that the objective of Congress was broadly to protect the funds and property of the Government."); *McNinch*, 356 U.S. at 599 (FCA designed to halt "plundering of the public treasury"). The statute does not target any and all transgressions by a government contractor. Rather, it targets a specific type of transgression: the submission of an inflated request for payment. *See, e.g., United States v. Halper*, 490 U.S. 435, 444 (1989) (FCA "designed to 'protect the government from financial loss'—rather than to 'vindicate public justice'") (quoting *Marcus*, 317 U.S. at 548-49). To establish liability under the FCA, the Government (or a *qui tam* relator) must at the very least allege and prove that a particular transgression resulted in an excessive demand for government money. "The statute imposes liability only for the commission of acts which cause false claims to be presented." *United States v. Bornstein*, 423 U.S. 303, 312 (1976).[22]

It necessarily follows that where, as here, an alleged infraction does not have the effect of inflating any claim against the public fisc, it is beyond the FCA's scope. "[T]he allegedly false claim must be one that is capable of causing an injury to the funds or property of the United States." *United States v. Azzarelli Constr. Co.*, 647 F.2d 757, 759 (7th Cir. 1981). *See also Peterson v. Weinberger*, 508 F.2d 45, 52 (5th Cir.) ("A claim is within the purview of the False Claims Act

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[22] The FCA's location in Title 31 of the U.S. Code ("Money and Finance") further underscores its focus on protection of the public fisc.

if it is grounded in fraud which might result in financial loss to the Government."), *cert. denied,* 423 U.S. 830 (1975). A breach of contract, or a statutory or regulatory violation by a government contractor, does not necessarily result in a "false claim," and thus does not *per se* give rise to an FCA cause of action.

That is not to say that government contractors are free to ignore their legal obligations as long as they are careful not to submit any false claims. To the contrary, contractors may face liability under their contracts or a specific statute or regulation governing their conduct. They might even face liability under a general anti-fraud statute. But a contractor cannot be held liable under the *FCA* unless the Government (or a *qui tam* relator) establishes that it knowingly submitted a false claim for payment or approval. The FCA, in short, "was not designed to reach every kind of fraud practiced on the Government." *McNinch*, 356 U.S. at 599. *See also United States v. Cohn,* 270 U.S. 339, 345-47 (1926) (FCA does not prohibit fraudulent obtaining of property from the Government in its capacity as bailee, because the public fisc does not suffer any "pecuniary or property loss"); *United States ex rel. Glass v. Medtronic, Inc.*, 957 F.2d 605, 608 (8th Cir. 1992) (alleged violation of medical device reporting requirement incapable of establishing a "false claim"). "[I]f Congress had intended to prohibit all intentional deceit of the Federal Government, it would have used [broader] language." *United States v. Yermian*, 468 U.S. 63, 71 (1984).

Were the law otherwise, the FCA would swallow up a large chunk of both contract law and the U.S. Code. In particular, the FCA would subsume the False Statements Act ("FSA"), 18 U.S.C. § 1001, which proscribes making false statements to the Government. As this Court recently emphasized, not every false statement gives rise to a false claim. *See Hubbard v. United States*, 115 S. Ct. 1754, 1760 (1995). Because the FCA is "limited to false statements *intended to bilk the Government out of money or property*," it is "far narrower" than the FSA.

Id. (emphasis added); *see also United States v. Grainger*, 346 U.S. 235, 242-43 (1953). A false statement incapable of causing injury to the public fisc, in other words, may be actionable under the FSA, but not the FCA.[23]

Confining the FCA to its proper realm has especially significant practical implications in light of the statute's extraordinary *qui tam* enforcement mechanism. The FCA represents a notable exception to the general rule that the Executive Branch enforces the laws of the United States on behalf and in the name of the United States. Under virtually every other statute, an injury to the United States can be redressed only by the United States. To the extent the FCA is construed to authorize *qui tam* actions to enforce the statutory and regulatory rights of the United States across the board,[24] it subverts Congress' policy choice concerning the appropriate enforcement of federal law.

Finally, it is important to bear in mind that the substantive scope of the civil FCA, 31 U.S.C. § 3729, is in relevant part materially identical to the substantive scope of the criminal FCA, 18 U.S.C. § 287. Thus, the scope of the civil provisions "'must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms.'" *Bornstein*, 423 U.S. at 313 n.8 (quoting *McNinch*, 356 U.S. at 598); *cf. United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-518 (1992) (plurality opinion) (rule of lenity applies to civil provisions with criminal applications); *id.* at 519 (Scalia, J., concurring in judgment) (same). Although it is hardly necessary to invoke the rule of lenity to conclude that a

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[23] Indeed, the cover page of the CAS disclosure provisions at issue here stated in no uncertain terms: "THE PENALTY FOR MAKING A FALSE STATEMENT IN THIS DISCLOSURE IS PRESCRIBED IN 18 U.S.C. 1001." J.A. at 17.

[24] *See, e.g., United States ex rel. Fine v. Sandia*, 70 F.3d 568, 572 (10th Cir. 1995) ("The FCA, with its *qui tam* provision, is a means to pursue a remedy for violations of other statutory provisions, here the [Nuclear Waste Policy Act].").

"false claim" requires something more than technical noncompliance with a disclosure regulation, that venerable rule highlights the impropriety of casually converting the FCA into an all-purpose code of procedural regularity.

B. An Inadequate Disclosure of Accounting Practices Cannot *Per Se* Give Rise To FCA Liability.

The Ninth Circuit expressly acknowledged that Hughes' commonality accounting practices were proper and did not result in any request for payment to which Hughes was not entitled. *See* Pet. App. at 4a, 25a. It necessarily follows that any inadequacy in Hughes' *disclosure* of those accounting practices to the Government and Northrop could not have resulted in any improper request for payment. Accordingly, any disclosure inadequacy could not have resulted in a "false claim," and this case should have been dismissed outright. Instead, the Ninth Circuit held that "the lack of a determination of actual harm [from an allegedly improper disclosure] does not preclude a claim under the FCA." *Id.* at 25a. The court thereby ratified the misguided view that the FCA proscribes any and all statutory or regulatory infractions by a government contractor.

In support of that remarkable holding, the Ninth Circuit cited *Rex Trailer Co. v. United States*, 350 U.S. 148, 152 (1956). *See* Pet. App. at 25a. That case, however, is not remotely on point. *Rex Trailer* held only that the Government was not required to prove "specific damages" to recover a statutory penalty for fraud. *See* 350 U.S. at 152-53. The FCA's statutory penalty provision, the *Rex Trailer* Court noted, operates like a "liquidated-damage provisio[n] which fix[es] compensation for anticipated loss" when "damages are uncertain in nature or amount or are unmeasurable." *Id.* at 153. The fact that proof of specific damages is unnecessary to establish liability under the FCA, however, in no way suggests that the possibility of injury to the public fisc is unnecessary to establish such liability. As the Seventh Circuit has explained, "[t]he lack of any requirement of specific evidence of *damages*

does not dispense with the need to establish an *injury*." *Azzarelli*, 647 F.2d at 762 (emphasis added) (citing *Rex Trailer*, 350 U.S. at 152-53).

Hughes' alleged noncompliance with its accounting disclosure obligations does not create a genuine issue of material fact under the FCA for the simple reason that any such noncompliance was incapable of resulting in any injury to the public fisc.[25] If, as the Ninth Circuit acknowledged, Hughes' underlying accounting practices were entirely proper and actually *saved* the Government money, then *a fortiori* any inadequate *disclosure* of those practices could not have resulted in a "false claim." The immaterial disclosure deficiencies alleged here do not present a genuine issue of material fact under the FCA, in short, because they did not lead Hughes to request a single penny from the Government to which the company was not entitled. *See* Pet. App. at 67a-68a; J.A. at 144-45; *cf. United States v. Data Translation, Inc.*, 984 F.2d 1256, 1267 (1st Cir. 1992) (affirming dismissal of FCA claim because the "alleged nondisclosure could not have been material to the price negotiated") (Breyer, J.); *Brunswick Bank & Trust Co. v. United States*, 707 F.2d 1355, 1365 (Fed. Cir. 1983) (no FCA violation where alleged misrepresentation would not affect Government's obligation to pay under contract).[26]

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[25] It is far from clear whether Hughes' delay in formally submitting a revised CAS disclosure statement even amounts to a violation of its disclosure obligations. Notwithstanding that delay, the Government was aware at all times that Hughes was developing common parts for the B-2 and F-15 aircraft, *see supra* p. 6, and that Hughes previously had used commonality agreements to allocate costs, *see* Pet. App. at 39a-40a.

[26] The Ninth Circuit suggested that the alleged defects in Hughes' disclosure of its accounting practices to Northrop and the Government "may" have rendered unspecified costs "unallowable" within the meaning of a federal regulation. Pet. App. at 19a, 25a (citing 48 C.F.R. § 31.201-2(a)(3)). That suggestion is baseless as a matter of fact and law. Following a lengthy investigation, the Government's Contracting Officer determined

(continued...)

C. New Allegations Raised in a Brief in Opposition to Summary Judgment Need Not Be Treated as *De Facto* Amendments to a Complaint.

The Ninth Circuit erred not only by holding that Schumer was entitled to a trial based on his allegation of inadequate disclosure to the Government, but even by addressing that allegation in the first place. The court freely acknowledged that Schumer had first presented this allegation in his brief in opposition to summary judgment, *see* Pet. App. at 22a, but held that the District Court had erred by not treating the new allegation as a *de facto* amendment of the complaint, *see id.* at 22a-23a.

That holding makes no sense. The procedures governing the amendment of a complaint are set forth in Fed. R. Civ. P. 15. Under that rule, the decision whether to permit a plaintiff to add new allegations to a complaint is within a district court's *discretion*. *See, e.g., Foman v. Davis*, 371 U.S. 178, 182 (1962). The Ninth Circuit's rule thus leads to the anomalous result that a district court has discretion to deny a formal motion to amend a complaint under Rule 15, but no such discretion to deny a *de facto* amendment when a plaintiff

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(...continued)
that Hughes' commonality accounting practices complied with applicable regulations, that any nondisclosures were immaterial, and that no adjustment to the contract price should be made. *See* Pet. App. at 67a-68a. Accordingly, the Government paid Hughes the $15.4 million that had been withheld during the course of the investigation. Under black-letter government-contracts law, "a determination by a contracting officer that a cost is allowable, combined with payment of that cost, binds the Government so that no challenge to the allowability of the cost can be maintained." J. Cibinic & R. Nash, *Cost-Reimbursement Contracting* 1106 (2d ed. 1993) (citing cases). Thus, Schumer failed to present any "genuine issue of material fact" regarding any "unallowable" cost, much less any "genuine issue of material fact" regarding any FCA violation.

simply raises a new claim in a brief in opposition to summary judgment.[27]

The Ninth Circuit's rule of mandatory *de facto* amendment also subverts the core purpose of a complaint: to put the defendant and the court on notice of the plaintiff's claims. *See, e.g., Pritchard v. Rainfair, Inc.*, 945 F.2d 185, 191 (7th Cir. 1991) ("The defendant and the court should not be left to speculate as to what theory the plaintiff may be pursuing."). Such notice is particularly important where, as in FCA cases, allegations of fraud are involved. *See, e.g., Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476-77 (2d Cir. 1995) *(per curiam)* (FCA complaints must be pleaded "with particularity" pursuant to Fed. R. Civ. P. 9(b)), *cert. denied*, 116 S. Ct. 1836 (1996). The summary judgment process will not work if a plaintiff's allegations are an ever-moving target. *See, e.g., Pritchard*, 945 F.2d at 191 ("[An] attempt to amend [a] complaint by briefs in opposition to summary judgment . . . is both untimely and improper."). Litigation should not be a ceaseless game of cat-and-mouse.[28]

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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[27] That anomaly is manifest *in this very case*, as the Ninth Circuit proceeded to *affirm* the District Court's denial of Schumer's formal Rule 15 motion to amend his complaint in light of his "undue delay." Pet. App. at 28a-29a. Schumer did not present the new allegations in his brief in opposition to summary judgment until more than three weeks *after* his unduly dilatory Rule 15 motion. *See* J.A. at 7-8.

[28] The Ninth Circuit's erroneous holding on *de facto* amendment relates only to Schumer's challenge to the adequacy of Hughes' disclosure to the *Government*, *see* Pet. App. at 22a-26a, not to his challenge to the adequacy of Hughes' disclosure to *Northrop*, *see id.* at 19a-22a.

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No. 95-1349

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY,
Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,
Respondent.

CORRECTED COPY

On a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

A. District Court Proceedings

1. On January 20, 1989, William J. Schumer, the respondent in this Court, commenced this action against Hughes Aircraft Company ("Hughes"), the petitioner herein. The suit was brought pursuant to 31 U.S.C. § 3730 (b), the provision of the False Claims Act ("FCA" or "Act") that authorizes a private individual to bring claims on behalf of the United States against persons alleged to have submitted false or fraudulent claims to the United States.

Schumer's complaint alleged that, as the subcontractor on a number of defense contracts between the United States and various prime contractors (i) Hughes knowingly mischarged costs to those prime contractors—and ultimately to the Government—by allocating costs among its various contracts through the use of an internal "Commonality Agreement" (an arrangement reached among Hughes' own managers) which called for cost allocations different from those required by the terms of Hughes' contracts, J.A. 72-73; and (ii) Hughes "ordered said Commonality Agreement [to be] . . . suppressed or concealed from the customers of Hughes including the United States Government," J.A. 72.

Schumer alleged in particular that, as a result of this mischarging and concealment, certain radar development costs that should have been allocated to a fixed-price contract with the McDonnell-Douglas Corporation to improve the F-15 fighter were instead allocated and charged to a "cost-plus" contract with the Northrop Corporation to provide a radar system for the B-2 bomber. J.A. 72.[1] Because both the subcontract between Hughes and Northrop and the prime contract between Northrop and the United States

[1] The B-2 program is referred to in the complaint by the code name "2301 Special Program," because the program was classified at the time. *See* J.A. 73.

were "cost-plus" contracts, Pet. App. 42a, J.A. 29, every dollar charged by Hughes to Northrop ultimately was to be reimbursed to Northrop by the Government.[2]

2. When an FCA *qui tam* action such as this is commenced, the United States has the option to (i) intervene and assume "primary responsibility for prosecuting the action;" (ii) "dismiss the action" after affording the relator notice and an opportunity to be heard; or (iii) do neither "in which case the person bringing the action shall have the right to conduct the action." 31 U.S.C. §§ 3730 (b)(2), (b)(4), (c)(2)(A). In the instant case, the Government chose the last of these options by entering its notice of election not to intervene on May 30, 1990. J.A. 104.

3. On September 7, 1990, Hughes moved under Federal Rule of Civil Procedure 56(b) to dismiss Schumer's action as jurisdictionally barred. *See* Docket No. 29 at 2.[3]

Hughes contended first that the applicable provision governing jurisdiction over *qui tam* actions was the one in effect prior to 1986, when Hughes engaged in its allegedly wrongful conduct. *See* 31 U.S.C. § 3730(b)(4) (superseded). Under that provision if, at the time of the relator's suit, the Government *possessed* the information on which the relator's suit was based, the suit was barred.

Hughes argued in the alternative that the suit was barred in any event because it was "based upon the public disclosure of allegations . . . in a[n] . . . administrative . . . audit," within the meaning of 31 U.S.C. § 3730(e)(4)(A) (quoted in full *infra* at 20), which was enacted in

[2] On April 3, 1990, Schumer filed a First Amended Complaint. That complaint alleged that Hughes' managers had entered into other allegedly improper internal "Commonality Agreements" respecting the allocation of costs to Government contracts, J.A. 90, and, again, the complaint alleged that Hughes ordered the Commonality Agreements "suppressed or concealed from . . . the customers of Hughes and the Department of Defense, including specifically the United States Air Force and Navy Project Offices." *Id.*

[3] Docket references herein are to the district court docket.

1986 as part of the False Claims Amendments Act (hereinafter "1986 Amendments").

Hughes relied on two documents to establish that prior to the filing of Schumer's complaint, the United States both had possessed, and had made public disclosure of, the information on which Schumer's suit was based: first, an Air Force audit report which, when suit was filed, was classified as "SECRET," J.A. 29, 117; and second, an unclassified, redacted version of a one-page classified Defense Contract Audit Agency ("DCAA") document called a "DCAA Form 1," J.A. 43-44. Both documents were disclosed only to Hughes and to Northrop, the prime contractor on the B-2 program, and to no one else. J.A. 114. And, Hughes submitted no evidence that Schumer had even seen, let alone derived his information, from either of those documents.

On November 1, 1990, the district court summarily denied Hughes' motion. Pet. App. 34a.

4. On January 27, 1992, Hughes renewed its motion to dismiss for lack of jurisdiction. In this second motion, expressly brought pursuant to Fed. R. Civ. P. 12(b)(1), Hughes stated that its motion was *not* predicated on the release of any classified audit reports such as the Air Force report, but instead on three subsequent unclassified DCAA audit reports and on the redacted "Form 1" described above. J.A. 177. The DCAA audit reports, though unclassified, were disclosed only to Hughes and not to Northrop or to anyone else. J.A. 172-73.

Each of the three DCAA audit reports that Hughes contended was "publicly disclosed" contained a cover sheet bearing the following statement:

> Contractor information contained in this audit report may be confidential. The restrictions of 18 U.S.C. 1905 [a criminal provision prohibiting Government employees from making unauthorized disclosures of information obtained in the course of their employ-

ment] should be considered before this information is released to the public.

This report may not be released to any Federal agency outside the Department of Defense without the approval of Headquarters, DCAA, except to an agency requesting the report in negotiating or administering its contract. [J.A. 33, 39, 59.]

And, on each page of each report, the following legend appeared in capital letters: "FOR OFFICIAL USE ONLY." *See* J.A. 33-42.[4] Although the DCAA audit reports and the related Form 1 were not classified, Hughes had, prior to the time of its motion, claimed that those documents were confidential, proprietary documents.[5]

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[4] Underscoring the sensitive nature of DCAA audits, the Defense Contract Audit Agency Manual, p. 1-506, instructs DCAA auditors as follows:

> Perform audits in such privacy as warranted under the circumstances, and provide all necessary safeguards of contractor-confidential data. Working papers, audit reports, unpublished financial statements . . . and other records and sources available to or in the possession of the auditor usually contain information which the contractor regards as confidential. Use such information only for performance of official duties. *The auditor shall not disclose the information to other persons except with the contractor's permission, and shall not discuss information in a manner which might permit disclosure to unauthorized persons.* [Emphasis added.]

[5] Thus, on February 11, 1991—two years after the action was commenced—Hughes, in response to a Freedom of Information Act ("FOIA") request by Schumer's then-counsel, objected to the release of any DCAA documents concerning Hughes' accounting practices on the grounds that the documents would "contain 'trade secrets and commercial or financial information' which is 'privileged or confidential' to Hughes under exemption (b)(4) of 5 U.S.C. § 552 [*i.e.*, the FOIA]." J.A. 119. Hughes receded from that position regarding a second FOIA request by Schumer's counsel in light of the overlap between the FOIA request and the court discovery in this case, and particularly in light of the fact that the court had issued a protective order covering the documents in question. J.A. 125-27, 130 & Docket No. 70.

In response to Hughes' second motion to dismiss, Schumer contended that the issuance to Hughes of the various DCAA documents did not constitute a "public disclosure." Docket No. 118. Schumer also contended that his action is not "based upon" the disclosure of those documents, stating in a declaration submitted with his opposition papers that he had seen no audit reports at the time his suit was filed and that he did not derive his allegations therefrom. *Id.*; J.A. 186.[6] Finally, Schumer contended that he was an "original source" and thus was exempt from the "public disclosure" bar. Docket No. 118.

The district court again summarily denied Hughes' motion to dismiss for lack of jurisdiction. J.A. 196.

5. At the same time that Hughes moved to dismiss based on the "public disclosure" bar, Hughes also moved for summary judgment on the merits. Hughes contended that it had fully disclosed the basis of its cost accounting system to all of its customers and that the Company had complied with all applicable contractual and regulatory requirements relating to cost allocation—including its obligation, pursuant to Public Law 91-379 § 719(h) (current version at 41 U.S.C. § 422(h))—to provide to the Government, as a condition of contracting, a Cost Accounting Standards Board (CASB) Disclosure Statement.

After full briefing of all issues—including the inadequate disclosure issues raised by Schumer's complaint—the district court granted summary judgment on the ground presented by Hughes, *viz.*, that Hughes had complied with all applicable regulatory and contractual requirements and had made no false or misleading state-

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[6] While Schumer's testimony that he had not seen the audit reports stands undisputed, there is conflicting evidence as to whether Schumer had read the redacted "Form 1" prior to filing suit. *Compare* Docket Nos. 44, 263 *with* J.A. 83. But Hughes has *never* contended that the Form 1's one-paragraph description of the alleged accounting violations contains enough information to have formed the basis of the allegations in Schumer's complaint.

ments to Northrop or, in its Disclosure Statement, to the United States.[7]

B. The Ninth Circuit Opinion

Schumer appealed on the merits, and Hughes cross-appealed on the denial of the Company's motion to dismiss for want of jurisdiction.

The Ninth Circuit affirmed the district court on the jurisdictional issue. On the merits, the Ninth Circuit affirmed in part and reversed in part, remanding two claims to the district court for further proceedings.

First, the Ninth Circuit held that there is a genuine issue of material fact with respect to whether Hughes had made a misleading disclosure to Northrop regarding the costs that would be charged to Northrop in connection with a particular type of advanced radar data processor ("RDP") that Hughes proposed to supply to Northrop for the B-2. Pet. App. 19a-20a.

The Ninth Circuit pointed out that Northrop's chief contracting officer, R.K. Blakeney, had stated in a February 20, 1986 "White Paper" that, in December 1982, Hughes had proposed an advanced RDP to be used in the B-2 "with no . . . cost impact attendant thereto," and that, on that basis, Northrop approved the proposal in 1983.

[7] In his papers filed in opposition to the summary judgment motion Schumer contended (i) that Hughes' CASB Disclosure Statement was incomplete and misleading; and (ii) that Hughes had violated 48 CFR § 99-401.50, a procurement regulation known as "CAS 401," by using a different cost accounting system for charging costs to contracts than the Company had used for estimating costs when it bid the contracts.

In reply, Hughes argued that the CAS 401 claim—and *only* that claim—was outside the scope of Schumer's suit because it was "unrelated to the allegations" in the complaint. J.A. 191-95. Hughes did not make that argument with respect to Schumer's Disclosure Statement claim; indeed, Hughes fully addressed that claim in its initial set of moving papers. *See, e.g.*, J.A. 147-156 (showing, *inter alia*, Hughes' discussion of Disclosure Statement issues in its Statement of Uncontroverted Facts).

According to Blakeney, Hughes had represented that the F-15 program was to "continue funding *all* development efforts" with respect to the advanced RDP, J.A. 24 (emphasis in original), and that Northrop therefore would not have to absorb those costs in order to obtain the advanced RDP.

The Ninth Circuit recognized that there was conflicting evidence on whether Northrop had been misled as to the costs of the RDP component of the B-2 program, Pet. App. 21a, but held that "[b]ecause a factfinder could choose to credit the conclusions reached in the white paper," *id.*, there was a "substantial issue as to the reasonableness of allowing the RDP charges," Pet. App. 19a.

Turning to the second of these merits issues, the Ninth Circuit held that there is a genuine issue as to whether the CASB Disclosure Statement that Hughes submitted to the Government adequately disclosed Hughes' system for allocating costs among government contracts. Pet. App. 25a. The submission of an accurate CASB Disclosure Statement is a condition precedent to obtaining government contracts of the type at issue here, *see infra* at 45-46, and the Ninth Circuit held that Hughes' failure to submit an accurate Disclosure Statement for the period from December 1982 to January 1984 constituted a "noncompliance" with regulations that "may have rendered the costs unallowable under 48 C.F.R. § 31.201-2(a)(3)," a regulation governing allowability of government contract costs. The Ninth Circuit then added that "[a]lthough the Administrative Contracting Officer found that this noncompliance had an 'immaterial impact' on costs, the lack of a determination of actual harm from the CAS violation does not preclude a claim under the FCA." Pet. App. 25a.

SUMMARY OF ARGUMENT

I. The courts below were correct in denying Hughes' motion to dismiss this *qui tam* action for lack of jurisdiction and in their supporting determination that, under the False Claims Amendments Act of 1986, there had not been a "public disclosure" of the information on which this suit is based.

A. Although the false claims at issue here were made prior to the enactment of the 1986 Amendments, those Amendments nonetheless are determinative of the jurisdictional issue raised by Hughes.

A "statute does *not* operate 'retrospectively' "—and thereby trigger the presumption against retroactivity—"merely because [the statute] is applied in a case arising from conduct antedating the statute's enactment." *Landgraf v. USI Film Products*, —— U.S. ——, 114 S.Ct. 1483, 1499 (1994) (emphasis added). Rather, retroactivity concerns arise only where the application of a newly-enacted statute would "attach[] new *legal consequences* to events completed before [the law's] enactment." *Id.* at 1499 (emphasis added). The 1986 Amendments to the *qui tam* bar provision do not do so.

Those Amendments do not change the duties of those submitting claims to the United States or the correlative rights of the Government. Nor do those Amendments create a new cause of action where there was none before, change the substance of the extant cause of action, or alter a defendant's exposure for a false claim by even a single penny. Rather, all that the Amendments to the *qui tam* bar do is liberalize the conditions under which the federal courts can entertain FCA suits by one of the two kinds of plaintiffs the FCA always has empowered to bring suit. The statute is thus precisely the kind of law that *Landgraf* teaches should be applied upon enactment to all cases.

B. The 1986 Amendments do no bar this action, because there was no "public disclosure" of the allegations on which the action is based.

1. In the context of the FCA, "public disclosure" connotes disclosure in a manner that opens the disclosed information to any and all members of the public. That interpretation accords with settled canons of construction by giving "operative effect" to the word "public," rather than treating all disclosure as *ipso facto* public. Moreover, that interpretation is compelled by the legislative history of the 1986 Amendments which shows that the word "public" was added to those Amendments at a critical juncture in the legislative process—and quite deliberately—to provide a word of limitation assuring that *qui tam* suits based upon "non-public" disclosure would not be barred. And, reading "public disclosure" to mean disclosure in a manner open to the public at large strikes a balance on the bringing of *qui tam* suits that accords with the overall policy judgments and goals underlying the 1986 Amendments.

2. When all is said and done, the *only* "disclosures" at issue here were communications between the United States and its contractor and subcontractor concerning their contractual relationship. Whatever the precise metes and bounds of "public disclosure" for purposes of the *qui tam* bar, at the very least it requires disclosure to a member of the public, *as a member of the public*. To say that when the United States communicated with Hughes about Hughes' cost allocation methods the Government was making a "public disclosure" strains the English language beyond the breaking point.

From the standpoint of the policies underlying the *qui tam* bar, communications between the Government and its contractors are different in kind from communications with an individual *qua* member of the general public. Recipients of the former type of communications understand that they are receiving the information as agents of the contractor and that the information is otherwise being held in confidence; in contrast, when information is communicated to an individual as a member of the public, that individual is free to communicate the information to others. Thus, interpreting "public disclo-

sure" so as to require, at a minimum, a disclosure to a member of the general public as such furthers the underlying policies of the Act.

II. On the merits, the court below correctly held that Hughes was not entitled to summary judgment on the claims that Hughes violated the FCA by submitting a Cost Accounting Standards Board Disclosure Statement which failed to disclose Hughes' method for allocating development costs to the B-2 contract.

A. Contrary to Hughes' submission, the FCA reaches both (i) persons who knowingly make claims that are false or fraudulent in their own terms, such as inflated claims; and (ii) persons who knowingly make false statements to obtain payment of a claim, including false statements about the claimant's eligibility for a Government payment. The United States is entitled to define the substantive and procedural conditions that must be met before federal funds will be committed. And, if a claimant cannot (or believes it cannot) meet those conditions and deceives the Government as to its having met those conditions, the claimant commits a fraud that is actionable under the FCA, even if, in a given case, the claimant is able to prove *ex post* that a truthfully-informed Government would have made the same payment in any event.

B. In the instant case, even if Hughes' failure to include in its Disclosure Statement any information about its cost allocation system did not ultimately cause the Government to pay increased costs—and that is a disputed issue at this stage of the proceedings—it is undisputed that Hughes was required, as a condition of contracting, to accurately disclose its cost allocation system and that Hughes did not do so. Because the purpose of the Disclosure Statement requirement is to protect the public fisc in the long run, false Disclosure Statements lie at the very core of false statements that can form the predicate for FCA cases. Accordingly, the non-disclosure claim here was properly remanded for trial on the merits.

ARGUMENT

I. THE COURTS BELOW WERE CORRECT IN ASSERTING JURISDICTION OVER THIS *QUI TAM* ACTION

Since 1863, the False Claims Act has made persons who knowingly submit a false or fraudulent claim to the United States liable to the Government. For all that time, the FCA has authorized the United States to bring false claim suits in its own name and, at the same time, has authorized private parties to serve as nominal plaintiffs ("relators") and to bring such *qui tam* suits in a representative capacity on behalf of the United States. The rules of law and of liability are the same in Government-initiated, and in relator-initiated, FCA suits.

As originally enacted, the *qui tam* provision of the FCA authorized "any person" to prosecute a claim on behalf of the United States. Act of March 2, 1863, ch. 67, 12 Stat. 696. In 1943, Congress narrowed this authorization by providing that the courts "shall have no jurisdiction to proceed with [a *qui tam* action] based upon evidence or information in the possession of the United States." Act of December 23, 1943, Pub.L. No. 213, 57 Stat. 608.[8] Then, in the False Claim Amendments Act of 1986, Pub.L. 99-562, 100 Stat. 3153 ("the 1986 Amendments"), Congress changed course, and liberalized its authorization of *qui tam* actions by lowering the jurisdictional bar. Specifically, the 1986 Amendments preclude "jurisdiction over an action" only where that action is "based upon the public disclosure of allegations or trans-

[8] In 1982, Congress reenacted the FCA as part of a general recodification of Title 31 of the United States Code. Pub. L. No. 97-258, 96 Stat. 978. As recodified, the Act directed the courts to "dismiss an action . . . based on evidence or information the Government had when the action was brought." This recodification, as petitioner correctly notes, "was intended to 'restate' the previous provision 'without substantive change.'" Pet. Br. at 28 n.13, *quoting* H.R. Rep. No. 651, 97th Cong. 2d Sess. 1 (1982). Indeed, § 4(a) of the recodification expressly states that the restated provisions "may not be construed as making a substantive change in the laws replaced." 96 Stat. 1067.

actions" in specified types of proceedings or in specified types of documents.[9] This section of the FCA currently is codified at 31 U.S.C. § 3730(e)(4); for convenience we shall refer to this section, and its predecessors, as the *qui tam* bar.

The 1986 Amendments to the *qui tam* bar—and the decisions below overruling Hughes' motions to dismiss this case for lack of jurisdiction—have generated two issues antecedent to the merits of this FCA suit: first, whether jurisdiction in this case is to be determined by reference to the 1986 Amendments; and second, if so, whether the allegations that give rise to this case were "publicly disclosed" before the case was filed.[10] We treat with these issues *seriatim*.

A. The Retroactivity Issue

The instant case was filed in January, 1989, more than two years after the 1986 Amendments were signed into law, but alleges that false claims were submitted prior to the enactment of the 1986 Amendments. The threshold question posed here is whether, in denying Hughes' motions to dismiss for lack of jurisdiction, the courts below erred in holding that the lower ("public disclosure") bar contained in the 1986 Amendments—rather than the higher ("Government possession") bar contained in the 1943 Act—provides the rule of decision for cases decided after enactment of the 1986 Amendments, including cases arising out of pre-enactment conduct.

1. Hughes' argument starts from the premise that "a statute will not be given retroactive effect in the absence

[9] Even where the action is "based upon public disclosure," the 1986 Amendments allow for *qui tam* jurisdiction if the relator is an "original source" of the disclosed allegations. *See infra* at 35.

[10] As Hughes acknowledges, even if, contrary to our showing in Part B, there were a "public disclosure" here, the jurisdiction of the courts could not be determined without a further determination of two questions which the court below "did not reach": first, "whether this action is 'based upon' any such [public] disclosure"; and second, "whether Schumer was an 'original source' of the information disclosed." Pet. Br. at 24 n.9.

of 'clear intent' by Congress." Pet. Br. at 14. So far, so good. For that is assuredly *one* of the lessons that *Landgraf v. USI Film Products*, —— U.S. ——, 114 S. Ct. 1483 (1994)—this Court's recent and definitive decision on the effect of an intervening change in the law on pending cases—teaches.

But there is a second, equally clear lesson taught by *Landgraf* that Hughes elides: the "presumption against retroactivity" does not cover the field of every statutory change made after a defendant has acted. As *Landgraf* explains, a "statute does *not* operate 'retrospectively' merely because [the statute] is applied in a case arising from conduct antedating the statute's enactment or upsets expectation based in prior law." 114 S. Ct. at 1499 (emphasis added; citation omitted). Rather, the "conclusion that a particular rule operates 'retroactively' "—and hence is covered by the presumption—"comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.*

Landgraf goes on to make it clear when the application of a statute to lawsuits arising out of "conduct antedating the statute's enactment" does have a retroactive effect. Quoting Justice Story's "influential definition" of retroactivity, *Landgraf* states:

> [E]very statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective. [114 S. Ct. at 1498-99, *quoting Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (CCDNH 1814) (Story, J.)]

Put more simply, retroactivity consists of "attach[ing] *new legal consequences* to events completed before [the law's] enactment." *Landgraf*, 114 S. Ct. at 1499 (emphasis added).

Of equal importance, *Landgraf* sets out the underlying rationale—and the limits—of the retroactivity concept. "Elementary considerations of fairness," *Landgraf* explains, "dictate that individuals should have an opportunity to know what the law is"—including an opportunity to know not only the substantive legal rules but also the "extent of a party's liability" for breach of those rules—in order that such individuals can have "confidence about the legal consequences of their actions" and "conform their conduct accordingly." 114 S. Ct. at 1497, 1507.

It follows that it is changes in laws which "regulate . . . primary conduct," and which therefore "have an impact on private parties' planning," that raise retroactivity concerns. 114 S. Ct. at 1502, 1506. "[C]onsiderations of fair notice, reasonable reliance, and settled expectations offer sound guidance" in determining when application of a newly-enacted law to pre-enactment conduct would raise an issue of retroactivity. *Id.* at 1499.

Based on all these considerations, *Landgraf* states the following rule:

> When a case implicates a federal statute enacted after the events in suit, . . . the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. [114 S. Ct. at 1505]

Landgraf gives this general rule additional content by identifying categories of cases which generally do *not* have retroactive effect. Thus, "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity" even if "application of the new rule operate[s] to a defendant's disadvantage in the particular case," because "rules of procedure regulate secondary rather than primary conduct." 114 S. Ct. at 1502 & n.28. And "intervening statutes conferring or ousting jurisdiction" likewise are "regularly applied" to all cases decided after the statute's enactment, because "normally . . . jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Id.* at 1501-02, *quoting*, *Republic Nat'l Bank of Miami v. United States*, —— U.S. ——, 113 S. Ct. 554, 565 (1992) (Thomas, J., concurring).

2. After *Landgraf*, petitioner's contention that application of the *qui tam* bar in the 1986 Amendments to the instant case violates the "presumption against retroactivity" cannot withstand scrutiny.

At all times relevant herein—indeed, since 1863—the FCA has made it unlawful to knowingly submit a false claim for payment to the United States. The *qui tam* bar in the 1943 Act did not define the duties of those submitting claims to the United States or the correlative rights of the Government. And the 1986 Amendments to that bar do not essay any such definitions. The amended bar thus in no way "impose[s] new duties with respect to transactions already completed." 114 S. Ct. at 1505.

Similarly, the 1986 Amendments to the *qui tam* bar do not create a new cause of action where there was none before, change the substance of the extant cause of action, or alter a defendant's exposure for a false claim by even a single penny. The amended bar thus does not "increase a party's liability for past conduct." 114 S. Ct. at 1505.[11]

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[11] It is, of course, true that *other* provisions of the 1986 Amendments altered the substantive provisions of the FCA, *e.g.*, 31 U.S.C. § 3730(h) (making it unlawful to penalize an employee for initiating or participating in an FCA suit), and increased the penalties for FCA violations, 31 U.S.C. § 3729(a). But as *Landgraf* makes clear, "there is no special reason to think that all the diverse provisions of [a law] must be treated uniformly" for purposes of determining the applicability of such provisions to "pending cases and pre-enactment conduct." 114 S. Ct. at 1505. And, the only provision at issue here is the section of the 1986 Amendments which defines the courts' jurisdiction over *qui tam* actions.

Rather, the 1986 Amendments to the *qui tam* bar do one thing—liberalize the conditions under which the federal courts can entertain FCA suits by one of the two kinds of plaintiffs the FCA always has empowered to bring suit, the individual relator. Prior to 1986, once the United States learned of a false claim, only the Government could assert its rights under the FCA against the false claimant; as a result of the 1986 Amendments, the federal courts are open to an FCA action brought by a private relator on behalf of the United States unless there has been, *inter alia*, a "public disclosure" of the underlying allegations or transactions.

Indeed, the provisions at issue here fall squarely within *Landgraf*'s teaching that jurisdictional statutes are applicable once enacted, "whether or not jurisdiction lay when the underlying conduct occurred." 114 S. Ct. at 1501. In form, the *qui tam* bar is a jurisdictional statute: that section in terms limits the circumstances in which the federal courts "shall have jurisdiction" over an FCA *qui tam* action. Procedurally, the section operates as a jurisdictional provision. Indeed, the retroactivity issue is here on Hughes' appeal from the denial of its motion to dismiss this case for want of subject matter jurisdiction, and Hughes' *certiorari* petition framed the question presented as "[w]hether the courts below erred in asserting jurisdiction over this action." Pet. at p. i. Most importantly, in substance the *qui tam* bar "speak[s] to the power of the court rather than to the rights or obligations of the parties,' " 114 S. Ct. at 1501-02, and thus is precisely the kind of statute that *Landgraf* teaches should be applied upon enactment to all cases, including those arising out of pre-enactment conduct.[12]

[12] As should be apparent from the discussion in text, we fully agree with petitioner that *Landgraf* does not require the courts to "mechanically apply any and every statutory provision using the word 'jurisdiction' to pre-enactment conduct." Pet. Br. at 20. The hypothetical Hughes posits—a statute which in terms grants "jurisdiction to award punitive damages," Pet. Br. at 21—would raise questions quite different from those raised here where the provision at issue does nothing more than define the conditions under which a relator may sue on behalf of the United States in an FCA action.

3. In the face of all this, Hughes and its *amici* advance two interrelated arguments.

(a) Hughes seeks to locate this case within the rationale for the presumption against retroactivity by arguing that the 1986 Amendments to the *qui tam* bar are " 'the type of legal change that would have an impact on private parties' planning.' " Pet. Br. at 17, *quoting Landgraf*, 114 S. Ct. at 1506. Hughes' posit is that "[p]rior to 1986, a government contractor could avoid a *qui tam* lawsuit by voluntarily disclosing actual or potential contract irregularities to the Government"; after 1986, a "contractor's best efforts to avert a *qui tam* lawsuit by forthrightly addressing a problem could . . . be rendered for naught." Pet. Br. at 17-18.

What Hughes fails to recognize is that a *qui tam* lawsuit is *not* some distinct species of a claim of right—of a violation and of an attendant liability—which, prior to 1986, a contractor could extinguish by disclosing misdeeds to the United States. Rather, the *qui tam* lawsuit is a suit brought on behalf of the United States, asserting the rights of the Government, and seeking the remedies owed to the Government. Under the pre-1986 law, disclosure to the United States did *not* affect the Government's legal rights—or the contractor's liabilities—one iota. A contractor which made a disclosure to the United States under the prior law did not obtain a release from the Government.

That being so, assuming *arguendo* that prior to 1986 contractors preferred Government, rather than relator, enforcement of the FCA—and acted on that preference by putting the United States on notice that the contractor had wronged the Government—such preference would hardly amount to a "substantive legal right[]," Pet. Br. at 18, protected by the presumption against retroactivity.

(b) Hughes and its *amici* are thus left to complain that the 1986 Amendments—by lowering the bar to re-

lator enforcement of the FCA—increases the likelihood that contractors will be called to account for false claims.

We do not quarrel with the accuracy of Hughes' projection of the likely effect of lowering the *qui tam* bar. But the fact that the 1986 Amendments may increase the odds that a false claim will be challenged in court does *not* mean, as petitioner would have it, that the amended bar thereby "alter[s] the *legal* consequences of past conduct," Pet. Br. at 15 (emphasis in the original), "expands an FCA defendant's liability," Pet. Br. at 16, or alters "the *extent* . . . of liability," Pet. Br. at 18 (emphasis in the original).

Calling a thing by a name does not make it so. And, as we have seen, *Landgraf* makes clear that "legal consequences" and "liability" are defined by the substantive rules of law that define legal wrongs and the remedies for those wrongs, *not* by the rules governing the processes for securing a (previously available) remedy when a (previously-defined) legal wrong has been committed.

Indeed, the logic of petitioner's argument would apply equally had the 1986 Amendments simply directed the Justice Department to devote a higher priority to prosecuting false claims, or had those Amendments provided increased appropriations to fund additional positions to enforce the FCA. Such measures—like the changes in the *qui tam* bar—inevitably would increase the frequency with which FCA cases would be litigated.

Yet surely no putative defendant can claim any "vested right" to, or any "reasonable reliance" on, 114 S. Ct. at 1499, the level of resources the Government allocates to enforcing a particular statutory prohibition at a particular moment in time. Thus, a change in enforcement priorities cannot be said to upset "settled expectations," *id.* at 1499, even if that change leads to increased investigations—and prosecutions—of conduct occurring prior to the change in priorities. And, the fact that the means Congress chose in the 1986 Amendments to increase enforcement of the preexisting prohibition in

the FCA was to rely on private relators, rather than more Justice Department attorneys, creates no greater issue of retroactivity.[18]

In sum, the court below correctly decided to determine its jurisdiction by reference to the current version of 31 U.S.C. § 3730(e)(4).

B. The Public Disclosure Issue

It is undisputed that before respondent Schumer commenced this action, the United States had conducted a series of audits of Hughes. It is also undisputed that (i) the Government shared a report of an audit, which was classified, with authorized representatives of Hughes and Northrop who had security clearances; and (ii) that the Government transmitted certain confidential but unclassified audit reports to Hughes, and Hughes alone. *Supra* at 3-4.

The question thus raised is whether communications of this type—between the Government and its contractor

[18] It follows that petitioner is simply wrong in analogizing the enactment of 31 U.S.C. § 3730(e)(4) in 1986 to "the situation in which a new law either shortens or lengthens a statute of limitations." Pet. Br. at 22. Statutes of limitations are statutes of repose, *see, e.g., United States v. Kubrick*, 444 U.S. 111, 117 (1979), and, once a limitations period expires on a particular cause of action, putative defendants are, indeed, entitled to order their affairs on the premise that they no longer can be sued on that cause of action. But putative defendants can not do so where, as here, the relevant cause of action never has been extinguished but in fact always could be pursued by the Government.

Petitioner's reliance on *Winfree v. Northern Pac. Ry.*, 227 U.S. 296 (1913), is equally misplaced. In *Winfree* the intervening change of law in the Federal Employers Liability Act lengthened the statute of limitations; substituted a comparative negligence rule for the preexisting contributory negligence defense; eliminated the assumption of risk defense; and invalidated employment contracts which negated liability. *Compare* Act of April 22, 1908, 35 Stat. 65-66 *with* Act of June 11, 1906, 34 Stat. 232-33. The intervening law thus "permit[ted] recovery in cases where recovery could not be had before" by eliminating defenses which "disproved the right of action." 227 U.S. at 302. Needless to say, the *qui tam* bar, in stark contrast, does not deprive government contractors of defenses to the underlying cause of action.

and subcontractor in the course of, and as part of, their contractual relationship—constitute "public disclosure" within the meaning of the *qui tam* bar. As we proceed to show, the courts below correctly answered that question in the negative.

1. The proper "starting point" is the "language of the statute itself," *Consumer Product Safety Com'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980), which in this instance provides in full as follows:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. [31 U.S.C. § 3730(e)(4)(A).]

Plainly, the operative phrase is "public disclosure." That phrase is not a defined term in the Act, and it is common ground that the phrase is "no[t] a term of art with an established common law meaning," but rather is "susceptible to a range of plausible meanings." Pet. Br. at 25.

If the phrase were to appear, for example, in the context of a statute aimed at prohibiting "public disclosure," or privileging information from such disclosure, the phrase could fairly be understood to impose a bar against Government disclosure to even a single member of the general public (since the purpose of such a law would be to keep information confidential). Conversely, it is clearer yet that a "sunshine" statute which mandates "public disclosure," would not be satisfied by Government disclosure to a single individual selected because that individual has a particular kind of on-going relationship with the Government.

Our submission here is twofold. First, in the context of this Act, "public disclosure" connotes disclosure in a

manner that opens the disclosed information to any and all members of the public. Second, whatever the precise metes and bounds of "public disclosure," at the very least it requires disclosure to a member of the public, *as a member of the public*, and thus does not encompass communications solely between the United States and an entity with whom the Government has a special relationship, such as communications between the Government and its contractor or subcontractor concerning the parties' contractual relationship. We develop each point in turn.

2. (a) It is, of course, a "settled rule that a statute must, if possible, be construed in such fashion that every word has operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). Interpreting "public disclosure" to mean disclosure in a public manner—*viz.*, in a way that opens that which is disclosed to members of the public generally—meets this test by defining a line of demarcation between "public" and "non-public" disclosure and thereby affording operative meaning to the word "public." This interpretation has the added virtue of giving the phrase "public disclosure" in the *qui tam* bar provision a distinct meaning from the unmodified word "disclosure" in 31 U.S.C. § 3730(d)(1), which authorizes a reduction in the award to a relator whose action is "based primarily on disclosures" through the same means as those specified in 31 U.S.C. § 3730(e)(4)(A).[14]

In contrast, under the interpretation proffered by Hughes—which treats disclosure by the United States to "some member of the public" as "public disclosure," and treats every non-government person "who is a stranger to the fraud" as a "member of the public," Pet. Br. at 25-26—a disclosure and a public disclosure become all but sy-

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[14] *Cf. Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal quotations omitted).

nonymous. That effectively reads the word "public" out of the statute by denying the word any discernible "operative effect."

(b) The conclusion that in drafting the *qui tam* bar Congress used the word "public" deliberately and intended it as a word of limitation so as not to bar actions based upon "non-public" disclosures is compelled by the legislative history of the statute.

The *qui tam* provisions of the 1986 Amendments originated in a bill introduced by Senator Grassley, the chairman of the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee. S. 1562, 99th Cong. 1st Sess (1985). As drafted by Senator Grassley, the bar applied when

> (A) the action is based on specific evidence or specific information the Government disclosed as a basis for allegations made in a prior administrative, civil, or criminal proceeding; or
>
> (B) the action is based on specific information disclosed during the course of a congressional investigation or based on specific public information disseminated by any news media [S. 1562, § 3730 (b)(5)][15]

After a Subcommittee hearing, and in "response to Justice Department concerns, S. 1562, and specifically the *qui tam* provision, was significantly revised" by the Senate Judiciary Committee. S. Rep. 345, 99th Cong. 1st Sess.

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[15] The text of the Grassley bill is reprinted in Hearing Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1562, 99th Cong. 1st Sess. at 4-12 (1985) (hereinafter "Senate Hearings"); the *qui tam* bar provision appears at pp. 6-7.

Under the Grassley bill, the bar applied for a period of six months or "such additional time as the court allows upon a showing of good cause"; at the end of that time, if the Government "has not initiated a civil action . . . the court shall not dismiss the [*qui tam*] action." *Id.*

A companion bill was introduced in the House by Rep. Ireland. H.R. 3317, 99th Cong. 1st Sess. (1985).

at 14 (1985). Of particular relevance here, as reported unanimously by the Judiciary Committee, the *qui tam* bar applied to actions involving allegations or transactions where there had been prior

> disclosure of specific information relating to such allegations or transactions in a criminal, civil, or administrative hearing, a congressional or Government Accounting Office report or hearing, or from the news media. [S. 1562, § 3730(e)(4), *reprinted in* 132 Cong. Rec. 17942 (July 29, 1986).][16]

Although the Justice Department endorsed the Judiciary Committee bill, 132 Cong. Rec. 20530 (August 11, 1986), Senator Grassley continued to negotiate with his colleagues and a "broad based business coalition" and "reach[ed] a consensus," which Senator Cohen, a cosponsor of the bill, described as "meet[ing] the concerns raised by Senator Hatch and others without in any way weakening the fundamental provisions" of the bill. 132 Cong. Rec. 17936 (July 29, 1986). That consensus was embodied in a substitute bill which Senator Grassley offered on the floor of the Senate, and which he described as making "[m]inor changes . . . in the *qui tam* section." 132 Cong. Rec. 20536 (August 11, 1986). This substitute contained the version of the *qui tam* bar that ultimately was enacted into law.

Insofar as relevant here, the substitute differed from the Committee bill in two respects. First, the substitute expanded the enumerated list of proceedings and documents which could trigger the jurisdictional bar so as to include an "administrative report, hearing, audit or investigation." Second, at the same time, the substitute added the requirement that such disclosure must be a "public" disclosure in order to bar a subsequent *qui tam* action.[17]

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[16] Like the original Grassley bill, the bar provision in the Committee bill applied for a period of six months. *See supra* at n.15.

[17] The Senate passed the substitute bill which Senator Grassley offered without change. 132 Cong. Rec. 20542 (Aug. 11, 1986). The House thereafter passed a bill which closely resembled the

Three aspects of this evolution of the *qui tam* bar provision are especially worthy of note.

First, under both the Grassley bill and the Senate Judiciary Committee bill, the bar applied only where a disclosure took place in a forum or through a type of document which is "public" in the sense of being open to the public generally. The types of disclosures that raised the Grassley bill's bar—disclosures that were "a basis for allegations made in a prior administrative, civil, or criminal proceeding" or occurring "in the course of a congressional investigation"—were quite limited. And their common characteristic was to cover proceedings that generate an open, public record. The Committee bill expanded the bar somewhat, but only by adding other public fora and public documents, specifically "congressional or Government Accounting Office reports or hearings."

In the context of these bills, then, the word "public" would have been all but redundant since the bar was triggered only by proceedings that are typically public and by documents that are public by their very nature.[18]

Second, and as a corollary of the first, both the Grassley bill and the Senate Judiciary Committee bill contemplated that not *all* disclosures by the Government to one outside the Government were of a type to generate the *qui tam* bar. In particular, under both bills, relators who obtained their information through sources other than the enumerated types of proceedings and documents—including relators who obtained their information from *Government documents* outside of an "administrative, civil, or

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original Grassley bill. *Id.* 23345 (Sept. 9, 1986). When the bill returned to the Senate, Senator Grassley offered yet another substitute, but one which was identical to the Senate-passed bill on the provision at issue here. *Id.* 28833 (Oct. 3, 1986). The House then accepted the new Senate bill at the close of the Ninety-Ninth Congress. *Id.* 29315 (Oct. 7, 1986).

[18] Indeed, the Senate Committee report described the Committee bill as embodying a "public disclosure" requirement. S. Rep. 345, *supra*, at 28, 30.

criminal proceeding" or a "congressional or GAO report or hearing"—were *not* barred from suing on behalf of the Government.

Third and finally, as the bill progressed through the legislative process, the list of the types of proceedings and documents which could give rise to a bar was expanded to include some sources—specifically, "administrative reports, audits, and investigations"—which, as Hughes correctly states, "typically remain[] unknown and indeed incomprehensible to all but a few members of the public." Pet. Br. at 25. But, at the very moment in the legislative process when the bar provision was broadened in this way, the congressional draftsmen replaced the prior formulation—"disclosure . . . in . . ."—with the formulation "*public* disclosure . . . in . . ." The addition of the word "public" at this critical juncture thus served to capture the concept that had been integral to the bill throughout: that *not* every suit based upon information disclosed by the Government to a person outside the Government is a "parasitic" lawsuit that Congress wanted to bar from federal court, and that disclosures of allegations should *not* serve as a bar unless the disclosure is public in nature.

In the face of this history, Hughes' notion of "public disclosure" reduces to the proposition that while the draftsmen were at work crafting the compromise language that was ultimately enacted into law, they gratuitously—indeed, on Hughes' notion, whimsically—added the word "public" without intending the word to have a meaning. That argument collapses of its own weight.

(c) Reading "public disclosure" to mean disclosure in a manner open to the public at large makes sense not only of the language, structure and history of the Act but of its underlying policies as well.

The 1986 Amendments were enacted to combat what Senator Grassley termed "rampant fraud" in government programs and procurement. *Senate Hearings, supra* n.15, at 2. Relying on a study by the General Accounting

Office, the Senate Judiciary Committee found that "[f]raud permeates generally all Government programs ranging from welfare and food stamps benefits to multimillion dollar defense procurement," and that estimates of the cost of the fraud were as high as $10 to $100 billion annually." S. Rep. 345, *supra,* at 3. Of particular concern was "defense procurement fraud," which by itself was estimated to cost "$1 to $10 billion," and to involve large numbers of defense contractors. *Id.* at 2-3.

Part of Congress' response to this problem was, of course, to toughen the substantive and liability provisions of the False Claims Act, including providing for treble (rather than double) damages. *See* Pub. L. No. 99-562, § 2, 100 Stat. 3153. In addition, Congress sought to facilitate Government investigations and prosecutions through procedural rule changes, *id.*, § 5, 100 Stat. 3158, and by empowering the Attorney General to serve "civil investigative demands" on any person possessing "material or information relevant to a false claims law investigation," *id.* § 6, 100 Stat. 3158-68.

At the same time, the 1986 Congress was persuaded that the Government could not be relied upon alone to combat the "rampant fraud" in government programs. The Senate Judiciary Committee noted with alarm that "most fraud referrals [to the Justice Department from other Executive Branch agencies] remain unprosecuted and lost public funds, therefore, remain uncollected." S. Rep. 345, *supra,* at 4. Congress in turn attributed this lax enforcement to "a lack of resources on the part of Federal enforcement agencies"—a limitation which the Senate Judiciary Committee described as "perhaps the most serious problem plaguing effective enforcement." *Id.* at 7. And the Committee noted that "with current budgetary constraints, it is unlikely that the Government's corps of individuals assigned to anti-fraud enforcement will substantially increase." *Id.*

Thus, an essential purpose of the 1986 Amendment was to

> allow and encourage assistance from the private citizenry which can make a significant impact on bolstering the Government's fraud enforcement effort. The idea of private citizen aid in false claims actions is, of course, not a new one, but dates back to the original enactment of the False Claim Act in 1863. Additionally, in other areas of enforcement, such as antitrust and securities violations, the number of private enforcement actions far exceeds those brought by the Government. [S. Rep. 345, *supra,* at 8.]

On the floor of the Senate, Senator Grassley added that the "job is simply too big if Government officials are working alone." 132 Cong. Rec. 20535 (Aug. 11, 1986). And, Congress' commitment to creating a solid "partnership between public law enforcers and private taxpayers," *id.*, is manifest in a number of the provisions of the 1986 Amendments not at issue here. For example, those Amendments increased the awards for successful relators and added a new section prohibiting retaliation against an employee who initiates a *qui tam* action. *See* 31 U.S.C. §§ 3730(d), (h).

That same commitment is manifest as well in the changes the 1986 Amendments made in the *qui tam* bar. As we have seen, prior to 1986 the FCA barred *qui tam* suits "based upon evidence or information in the possession of the United States." Given the problem of inadequate prosecutorial resources and of cases being referred to the Justice Department by other Executive Branch agencies and going nowhere, Congress concluded that the mere fact that the Government possessed, or indeed had investigated, information which formed the basis for a *qui tam* action should no longer be the dividing line separating lawsuits that would be barred from lawsuits that would be encouraged. Instead, the 1986 Amendments redrew that line at the point at which "public disclosure" had occurred.

Against this background, the jurisdictional line makes sense if—but only if—the term "public disclosure" is understood to mean disclosure in a manner that opens the

disclosed information to members of the public at large. Once allegations are disclosed in this way—once they truly enter the public domain—those allegations then can be pursued by Congress, by private watchdog groups, and, of course, by the media. Thus, allegations of wrongdoing by a contractor which are in the public domain can generate pressure on the Executive Branch to respond to those allegations with vigor, and make a lack of vigor a matter for public censure. As Justice Brandeis observed many years ago, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." L. Brandeis, *Other People's Money* 62 (National Home Library ed. 1933).

A jurisdictional bar triggered by disclosure of allegations in a manner that opens the disclosed information to the public generally, in other words, strikes a balance on the bringing of *qui tam* suits that accords with the overall policy judgments and goals underlying the 1986 Amendments. Absent such a public disclosure, the danger that the Government will fail to act and that its inaction will go unnoticed is at its maximum; thus, in the eyes of the 1986 Congress, a *qui tam* relator who pursues allegations that are not yet public makes a contribution to the war against fraud. But once a public disclosure occurs, the danger the allegations will be overlooked or ignored by the Government is diminished, and after that point a subsequent *qui tam* suit derived from that information can be seen as adding little marginal value and hence as being appropriate to bar.

In contrast, Hughes' expansive reading of the bar to cover any disclosure makes nonsense of Congress' work. Hughes does not explain, because it cannot, why Congress would choose to eliminate the "Government possession" bar and then reimpose the bar as soon as the Government discloses its information to a single person, no matter what the basis for the disclosure or the circumstances. Surely, the fact that information from a Government audit or investigation has been conveyed to a single

individual or a single entity provides no assurance that the Government is "on the trail of the . . . fraud," as Hughes contends, Pet. Br. at 29.[19]

(d) For all of these reasons, we submit that the phrase "public disclosure" in 31 U.S.C. § 3730(e)(4) is properly read to mean disclosure in a public manner, *viz.*, disclosure which opens the disclosed information to members of the public generally.

On that reading, there is no doubt that the audits at issue here were not "public[ly] disclos[ed]" prior to this lawsuit. Those audits were not released to the general public. They were not published in any publicly-available document. And, they were not placed in any repository of documents or records open to the general public. On no theory, then, can it be said that they were opened to the public at large. It follows that there was no "public disclosure" within the meaning of § 3730(e)(4).

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[19] Hughes pretends that the *qui tam* bar applies only when a public disclosure occurs "*in the course of* an investigatory or enforcement action," Pet. Br. at 25 (emphasis added), or "in a manner that established that [the Government] had not abdicated its law-enforcement responsibilities," *id.* at 34; *see also id.* at 29, 30. In truth, however, a "public disclosure," *as Hughes defines the term*, can occur in circumstances where no law enforcement activity at all is underway, or when such activity is, or has been, prematurely abandoned. Indeed, it is not at all clear that the Government needs to be the maker—or even the recipient—of a disclosure for it to be a "public disclosure" under the statute; disclosure in a "civil hearing" where the only parties are private litigants has been stated by the lower courts to be a "public disclosure." *See, e.g., United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 652 (D.C. Cir. 1994).

What *is* clear is that if Congress had sought to make an open and active Government investigation the triggering event of the *qui tam* bar, it scarcely could have chosen a more opaque means of expressing that intent. And, Congress' concern that cases investigated by Executive Branch agencies were being referred to the Justice Department without being made the basis for FCA suits, *see supra* at 26, would be left wholly unaddressed if a Government "report," "audit," or "investigation" without more (or with only the negligible tad more that Hughes' definition of "public disclosure" adds to the equation) raised the *qui tam* bar.

3. We would be derelict if we did not add that when all is said and done, the *only* "disclosures" at issue here were communications between the Government and its contractor and subcontractor concerning their contractual relationship. Those communications were addressed to Hughes' management, *qua* management, and were disseminated within the corporate structure to other Hughes' employees (*qua* employees) as needed to enable the Company to respond to the Government. The scope, manner, and nature of those communications were occasioned by—and were defined by—this particular relationship between the parties and the particular needs of the parties to that relationship.

Whatever else is true, we submit, the term "public disclosure" cannot be interpreted to encompass such communications that take place within the confines of a contractual relationship between parties to the contract and that do not involve disclosure to even a single member of the public *qua* member of the public.

(a) We again begin with the statutory language. While the phrase "public disclosure" is, as we already noted, "susceptible to a range of plausible meanings," *supra* at 20, *quoting* Pet. Br. at 25, it is *implausible*, to say the very least, to label as "public disclosure" communications between two parties who have a particular kind of on-going relationship about matters within the scope of that relationship and as an integral part of that relationship. Even if the word "public" does not require disclosure to the public at large, at the very least it connotes disclosure to some *in* the *general* public as such. Thus, to say that when the United States communicated with Hughes about Hughes' cost allocation methods the Government was making a "public disclosure" strains the English language.

EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981), provides a helpful analogy. At issue in that case was a provision of Title VII which makes it unlawful for the EEOC to "make public in any matter whatsoever any

information obtained by the Commission" pursuant to its statutory authority. 42 U.S.C. § 2000e-8(e). The question posed was whether "disclosure of information in a Commission file to the employee who filed the Title VII claim is a public disclosure." 449 U.S. at 592. The Court answered that question in the negative with respect to the employee's *own* file, but not with respect to the "files of other charging parties who have brought claims against the same employer." *Id.* at 603. The Court explained that with respect to the investigative file on his own charge, the charging party "cannot belong to the public to which Congress referred" whereas "[w]ith respect to all files other than his own, he is a stranger." *Id.*

Associated Dry Goods illustrates that even when "public disclosure" is used in its broadest sense for the purposes of keeping information strictly confidential—and thus out of the hands of any and all members of the general public—there are nonetheless certain individuals and entities who are not part of the general public because of their particular relationship with the Government in a particular context. Communication to such a person within such a relationship—such as the communication to the charging party in *Associated Dry Goods*—does not constitute "public disclosure." That lesson applies *a fortiori* in the instant case, where the statute at issue is not a privacy or non-disclosure statute but a statute that *requires* a "public disclosure" to trigger the *qui tam* bar.[20]

(b) Interpreting "public disclosure" so as to require, at a minimum, a disclosure to a member of the general

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[20] *See also Consumer Product Safety Com'n v. GTE Sylvania, supra* (interpreting a statute, 15 U.S.C. § 2055(b), authorizing the CPSC to investigate the safety of consumer products and requiring the CPSC, "prior to" making "public disclosure of any information obtained under this Act," to give "each manufacturer . . . of any consumer product to which such information pertains" advance notice of a proposed "public disclosure" and an opportunity to rebut the information; under the statute, communication with the manufacturer is thus *antecedent to* the "public disclosure" and is *not* itself a "public disclosure").

public as such also furthers the underlying policies of the Act.

When information is communicated to an individual as a member of the public, that individual is free to communicate that information to others. The information thus has at least the generative potential of entering into the public discourse even if it has been conveyed only to a single member of the general public.

But when information is communicated to an individual because he or she has some special capacity, and is not also communicated to anyone in the public at large, the individual may well feel constrained to keep the information confidential. That is especially true if dissemination of the information outside the protected relationship could be viewed by the recipient's employer to be improper or detrimental to its interests.

No one would contend, for example, that a "public disclosure" occurs when one government employee informs another government employee, as a co-worker, of allegations of fraud under investigation, even though both individuals are members of the public as well as government employees. Similarly, if the United States were to retain an outside investigative agency, auditor, or law firm to pursue evidence of fraud and disclose that evidence to employees of the entity thus retained, those communications could hardly be termed "public disclosure."

So, too, when the United States communicates with a contractor, through the contractor's authorized representatives, about claims submitted to the Government by the contractor under the contract, those communications are, in the nature of things, non-public. The recipients of the communication understand that they are receiving the information as agents of the contractor, and that the information is otherwise being held in confidence.

The communications in question here underscore this point. The Defense Contract Audit Agency instructs its personnel that they "shall not disclose [audit] information to other persons except with the contractor's permission."

See supra at 3-4. And, the recipients may well feel a duty —or at least a sense—of loyalty to their employer and an obligation to keep information learned in confidence, at work, confidential. Given the nature and purpose of the *qui tam* bar such communications are thus different in kind from a communication with an individual *qua* member of the general public.[21]

(c) In practical terms, the consequence of treating communications between the United States and its contractors as "public disclosures" would be to bar *qui tam* suits whenever an investigation, or even a routine audit, by an agency of the Government, is commenced—without regard to whether the inquiry is performed thoroughly and pursued diligently or instead is performed perfunctorily and abandoned precipitously. Any time the Government receives any allegation of wrongdoing—and certainly any time the Government commences an audit or investigation —there almost certainly will be communications with the contractor in the form of a notice, a request for information or the like. Given Congress' concern that even fully-investigated cases were being dropped by the Justice Department after being referred to it, a rule which barred *qui tam* suits whenever an audit or investigation is commenced would thwart a principal purpose of the 1986 Amendments.

Significantly, Hughes attempts to limit the sweep of its argument by relying on *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322-23 (2d Cir. 1992), to argue that public disclosure occurs only when "allegations of fraud are revealed to members of the public *with no prior knowledge thereof*," *viz.*, to "strangers to the fraud." Pet. Br. at 25-26.

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[21] *A fortiori*, if a disclosure is made by the Government to an agent of a contractor who is affirmatively restricted from making further disclosure—such as when the Government transmits classified information—there plainly is no "public disclosure." For this reason, the disclosure to Northrop of the classified Air Force report cannot, even on the broadest conception of the term, be a "public disclosure."

But Hughes never deigns to explain why, on its view of the law, communications with those particular individuals within a corporate organization who have prior knowledge do not constitute "public disclosure" whereas communications with "strangers to the fraud" do. Both classes of individual are equally "members of the public." And disclosures to both classes are equally indicative—or, more precisely, non-indicative—of whether the Government is, in fact, prepared to bring an enforcement action with respect to the information being disclosed.[22]

The truth of the matter is, of course, that in these cases the United States is communicating with the contractor as an entity, *qua* contractor, and not with any individual as such. The contractor, by hypothesis, is not a "stranger to the fraud"; it is the responsible party. More importantly, the contractor, by hypothesis, is not a "stranger" to the contractual relationship and hence is not part of the relevant public for FCA purposes. Consequently, on any theory, the communications between the Government and Hughes did not constitute public disclosure of the allegations against Hughes.

For all these reasons—as well as the alternative reasons canvassed in the prior section of our "public disclosure" argument—we submit that the communications here between the Government and its contractors within their contractual relationship and as an integral part of that

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[22] The rule Hughes proposes is not only unprincipled but impractical as well. On Hughes' theory, the existence *vel non* of a bar apparently turns on, and requires a determination as to whether, the individual addressee of a United States communication to a corporation was a "stranger to the fraud." If the United States happened to communicate with an "innocent" employee of the corporation, then only the Government can enforce its FCA rights against the contractor; if the Government communicated with a "guilty employee," a relator is free to proceed with a *qui tam* suit on behalf of the Government. And, mind-bending problems of application would arise when the initial communication is addressed to an employee with prior knowledge, but the communication is received by, shared with, or seen by a "stranger to the fraud."

relationship do not constitute "public disclosure" of the allegations and/or the transactions put in issue in this case.

4. Hughes champions an alternative interpretation of the statute whose principal virtue, Hughes claims, is to preclude every *qui tam* suit based on publicly-disclosed information. But not even Hughes' construction of the Act can achieve that result, since on *any* reading of 31 U.S.C. § 3730(e)(4)(A), the *qui tam* bar applies only to information disclosed through specified types of proceedings or documents, and the bar cannot be raised by disclosure occurring through non-specified proceedings or documents. Thus, even on its own terms, Hughes' interpretation fails to make sense of the statute.

Moreover, the end Hughes is pursuing is one that fits Hughes'—rather than Congress'—purposes.

Hughes would have it that the "whole point" of the *qui tam* provision generally, and the jurisdictional bar in particular, is "to encourage whistleblowers to expose previously undisclosed fraud against the Government"; all other putative *qui tam* relators, says Hughes, are " 'parasitic' plaintiffs," properly barred from court. Pet. Br. at 23. That, Hughes states, was "the traditional understanding," and, according to Hughes, the point of the 1986 Amendments was to "preserve[] the FCA's traditional distinction between 'whistleblower' and 'parasitic' actions." Pet. Br. at 29-31.

Hughes' view of the world—and, most particularly, its definition of "parasitic" actions—was not the 1986 Congress' view. That is clear from the following considerations.

First, if Congress' sole purpose in relaxing the jurisdictional bar in the pre-existing law was to open the door to whistleblowers "with significant information to contribute on their own," and *only* to such whistleblowers, Congress could have achieved that purpose simply by adding an "original source" exception to the "Government possession" bar then in place. Yet Congress manifestly did more: the 1986 Amendments both added an "original

source" rule and *also* substituted "public disclosure" for "Government possession" as the litmus for the *qui tam* bar.

Second, even on Hughes' reading of the statute, one consequence of the 1986 Amendments is to allow a relator who is not an "original source" whistleblower—a relator who is proceeding entirely on information known to the Government—to bring suit if there is not "any public disclosure." Such a suit would have been barred prior to 1986, under the old Government possession rule. Yet if, as Hughes contends, Congress' sole purpose was to encourage original source "whistleblowers"—if those who have no new information "add[] nothing of value," Pet. Br. at 32—Congress surely would not have removed the bar to such actions.

The short of the matter is that Hughes has identified only one of Congress' purposes in amending the *qui tam* bar in 1986. Congress intended to encourage "original source" whistleblowers, to be sure. But Congress also was of the view that Government enforcement of the FCA was sufficiently unreliable that relators who commence an FCA action can "add value," even if the relators' information is not "original." That explains why Congress chose both to allow original source actions and also to substitute a "public disclosure" bar for the "Government possession" bar.

Hughes is thus left to argue that, at the very least, relators whose knowledge is derived from the Government are parasitic plaintiffs because, Hughes asserts, they contribute nothing to advancing the goals of the statute.[23]

[23] Indeed, Hughes' theory, as articulated to the courts below, in fact goes even further than barring all relators who obtain their information from the United States. Hughes argued that once information is disclosed by the Government to a single individual, every member of the public is barred on the ground that any suit filed thereafter making allegations similar to those previously disclosed is "based upon" the "public disclosure," regardless of whether the individual bringing the suit actually derived any information from the disclosure. The only exception, under Hughes' theory, would be for a person who provided the information to the Government prior to the Government's disclosure. That person—and only that person—would fit Hughes' definition of an "original source." On this basis Hughes argued that respondent Schumer's action was barred by the disclosure of the audits to Hughes, regardless of whether Schumer derived his information from what the Government had disclosed to Hughes. Taken as a whole, then, Hughes' theory goes a long way towards reestablishing the old "Government possesion" rule in another guise.

This theory is not only inconsistent with the overall purposes of the statute, it is inconsistent as well with the central theme of Hughes' submission to this Court, *viz.*, that the "whole point" of the "public disclosure" provision is to bar those relators who derive their information from the Government.

At the same time, we recognize that on this issue—not reached by the court below and not presented here—the lower court law is in disarray. While Hughes' view of the meaning of "based upon" finds support in case law in the Second and Tenth Circuits, and some indirect support in the Ninth Circuit, the Fourth Circuit has persuasively criticized the Second and Tenth Circuit decisions for departing without basis from the plain language of the statute. *Compare United States ex rel. Kreindler & Kreindler v. United Technologies*, 985 F.2d 1148, 1158 (2d Cir. 1993) (adopting Hughes' view of "based upon"), *cert. denied*, 113 S. Ct. 2962 (1993) and *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548, 552 (10th Cir. 1992) (same), *cert. denied*, 507 U.S. 951 (1992) *with United States ex rel. Siller v. Becton Dickinson Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994) (holding that "based upon" means "derived from" and not "similar to"), *cert. denied*, 115 S. Ct. 316 (1995). *Cf. United States ex rel. Devlin v. State of California*, 84 F.3d 358, 362 (9th Cir. 1996) (suggesting inferentially that "based upon" means "similar to" and not "derived from"). Similarly, Hughes' view of the "original source" requirement finds both support and criticism in the circuit court case law. *Compare United States ex rel. Wang v. FMC Corporation*, 975 F.2d 1412 (9th Cir. 1992) (supporting Hughes' position) *with Siller, supra* (rejecting that position as inconsistent with the plain language of 31 U.S.C. § 3730(e)(4)(B), which defines "original source").

But that would be true only in a world in which, as Hughes blithely assumes, "public disclosure," assured that the Government both "has undertaken active steps to investigate particular allegations of wrongdoing," Pet. Br. at 32, and has not "abdicated its law-enforcement responsibilities," *id.* at 34. But if, as Hughes contends, public disclosure means disclosure to any member of the pub-

lic, including the involved contractor itself, then such disclosure provides no assurance at all of law enforcement rigor—as Congress understood.

This is not to say that in fact, or in Congress' eyes, a relator whose suit is based upon information learned from the Government through a non-public disclosure—*e.g.*, an employee of a contractor who has been privy to audit communications from the Government—stands on the same footing as a person bringing a case based on independent knowledge. To the contrary, at the same time that Congress amended the jurisdictional bar, Congress also added to the FCA a separate provision requiring a court, in *qui tam* cases joined by the Government, to *reduce or eliminate* the award to the *qui tam* relator if the action is "based primarily on disclosures" of Government information "other than information provided by the person bringing the action." 31 U.S.C. § 3730(d)(1). Specifically, in lieu of receiving an award in the range of 15 to 25 percent, such a relator may receive no more than 10 percent. *Id.*

This "knock down" provision answers Hughes' concern about providing "a windfall" to relators whose suit is based on information learned from the Government in the course of an active Government investigation. Those relators who are truly opportunistic, and who are merely seeking to hitch a free ride on a case the Government is prepared to bring without the relator's assistance, can be knocked down to zero. Conversely, those relators whose diligence caused a prematurely abandoned investigation to be revived as a result of the *qui tam* suit can receive 10 percent, even if they contributed no *new* information but simply saw the potential in old information that had been neglected.

For all these reasons, the court below correctly decided to assert jurisdiction over this action.

II. THE FALSE CLAIMS ACT IMPOSES LIABILITY ON A CLAIMANT WHO KNOWINGLY MISREPRESENTS OR OTHERWISE MISLEADS THE GOVERNMENT ABOUT THE CLAIMANT'S ELIGIBILITY FOR A GOVERNMENT PAYMENT.

On the merits, the Ninth Circuit remanded two claims to the district court for further proceedings: first, the claim that Hughes, by making inaccurate or incomplete statements to Northrop concerning the cost impact of a particular type of advanced Radar Data Processor (RDP), induced Northrop to accept a type of RDP more costly than the type Northrop would have accepted had Hughes provided a full and accurate depiction of the cost impact; and second, the claim that Hughes submitted claims for payment under the cost-plus B-2 contract without disclosing in its required Cost Accounting Standards Board Disclosure Statement, its method for allocating costs to that contract. Pet. App. 25a. As to the second claim the Ninth Circuit stated that the misleading Disclosure Statement "may have rendered" certain costs charged to the affected contracts "unallowable," and the court of appeals added, as an alternative holding, that in any event "the lack of a determination of actual harm . . . does not preclude a claim under the FCA." *Id.*

Hughes petitioned for *certiorari* only with respect to the Ninth Circuit's disposition of the CASB Disclosure Statement claim, and even with respect to that claim, Hughes' question presented was addressed only to the second of the Ninth Circuit's alternative holdings. Hughes' *certiorari* petition posed the question thusly: "Whether injury to the public fisc is an essential element of a cause of action under the False Claim Act." Pet. at i.

In its merits brief, Hughes—while continuing to focus solely on the court of appeals' alternative holding with respect to the second of the remaining claims—abandons any contention that "injury to the public fisc is an essential element" of an FCA cause of action.[24] In-

[24] That abandonment is compelled by this Court's repeated statements that an attempt to overcharge the Government can form the

stead, Hughes "reformulates" its question in the following tautological terms:

> Whether the False Claims Act imposes liability for alleged infractions of other statutes or regulations regardless of whether such infractions result in a "false claim" against the public fisc. [Pet. Br. at i]

We agree with Hughes that the FCA creates no such *per se* liability and that the answer to this all but content-free question is "no." But it does *not* follow—as Hughes suggests by phrasing its question in this way—that claims that constitute "infractions of other statutes or regulations" cannot also be "false or fraudulent claims" within the meaning of the FCA. Nor does it follow, as Hughes argues, that the FCA reaches only "an inflated request for payment." Pet. Br. at 38.[25] As we now show, the FCA's language, its purpose and its consistent interpretation all belie Hughes' severely reductionist reading of the statute.

A. The original False Claims Act as passed in 1863 provided in operative part for the liability in damages and a forfeiture of any person who

> presents or causes to be presented, for payment or approval any claim upon or against the Government

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basis of an action for civil penalties under the FCA even when the attempt fails because the Government discovers the fraud prior to payment. In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), for example, the Government discovered fraud on several of the projects at issue in time to withhold payment, and the Court nevertheless held that the claims submitted were actionable false or fraudulent claims. *Id.* at 552-553. *See also Rex Trailer Co. v. United States*, 350 U.S. 148, 153 n.5 (1956) (explaining the holding in *Marcus* on this point).

[25] In Hughes' view, "To establish liability under the FCA, the Government (or a *qui tam* relator) must at the very least allege and prove that a particular transgression resulted in an excessive demand for government money." Pet. Br. at 38. And, according to Hughes, where "an alleged infraction does not have the effect of inflating any claim against the public fisc, it is beyond the FCA's scope." *Id.*

> of the United States, . . . knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, . . . [Act of March 2, 1863, ch. 67, 12 Stat. 696]

That operative language stayed on the statute books until 1982 when as part of the recodification of Title 31 of the United States Code—and without any intent to change the FCA's substance, *see supra* at n.8—liability was imposed on any person who

> (1) knowingly presents, or causes to be presented to . . . Government . . . a false or fraudulent claim for payment or approval; or (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved. [31 U.S.C. § 3729]

And, while the 1986 Amendments made other changes to § 3729—principally with regard to remedies—those Amendments left § 3729's operative language intact.

The current words on their face thus reach *both* the making of a "false or fraudulent claim" and also the making "of a false record or statement to get a false or fraudulent claim paid or approved." While the multiplication of "falses" and "fraudulents" does not aid comprehension, the following point is clear: the provision—as its original, albeit cumbersome, language said—has always been intended to reach both (i) persons who knowingly make claims that are false or fraudulent in their own terms, *e.g.*, "inflated claims;" *and* (ii) persons who knowingly make false statements to obtain payment of a claim.

Given this statutory language—and given that the "[d]ebates at the time [the FCA was enacted] suggest that the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government," *United States v. Neifert-White Co.*, 390 U.S. 288, 292 (1968)—this Court "has consistently

refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil," *id*. Rather, the Court has properly understood the FCA as reaching any claim "grounded in fraud," and any "payment of Government money to persons who caused it to be defrauded." *United States ex rel. Marcus, v. Hess, supra,* 317 U.S. at 544.

And, this understanding is confirmed by the Senate Report on the 1986 Amendments which sums up the FCA's point as relevant here in the following terms.

> In its present form, the False Claims Act empowers the United States to recover double damages from those who make, or cause to be made, false claims for money or property upon the United States, *or who submit false information in support of claims.* In addition, the United States may recover one $2,000 forfeiture for each false claim submitted in support of a claim. . . . The United States is entitled to recover such forfeitures solely upon proof that false claims were made, without proof of any damages.
>
> * * *
>
> The False Claims Act is intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services. Accordingly, a false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation. A false claim for reimbursement under the Medicare, Medicaid or similar program is actionable under the Act . . . and such claims may be false even though the services are provided as claimed if, for example, the claimant [i.e. the physician who provided the services] is ineligible to participate in the program . . .
>
> * * *
>
> Likewise, each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim. [S. Rep. 345, *supra,* at 8-10; emphasis added]

It could hardly be otherwise. On Hughes' interpretation of the FCA, a contractor or a claimant for federal benefits can knowingly make misrepresentation or otherwise mislead the United States about the claimant's entitlement to money from the Government—but still incur no FCA liability if the claimant, ***after the fact***, is able to show that, had the Government known the truth, it ultimately would have paid out the same amount of money to the claimant in any event. Put more bluntly, a contractor could lie about having complied with a precondition to payment but suffer no penalty under the FCA for so doing. Such a rule would fall far short of protecting the integrity of the claims and contracting processes.

The decision in *United States v. Rohleder,* 157 F.2d 126 (3rd Cir. 1949), illustrates the correct reading of the FCA. In that case, the Third Circuit found an FCA violation where the contractor, in seeking reimbursement from the United States of money paid to subcontractors, falsified evidence regarding competitive bidding by subcontractors to obtain those subcontracts. There was no evidence in *Rohleder* that the subcontractor to whom the work in question was awarded (and whose costs the contractor sought to recover from the Government) had inflated its bid or would have been underbid had there been the requisite competition. Nonetheless, the court held that it was enough that the misrepresentation concerned a precondition to payment—*viz.,* that a competitive bidding process had been required in awarding subcontracts; that the contractor had represented compliance with that process; and that the representation in that regard was false.

United States v. Blecker, 657 F.2d 629 (4th Cir. 1981), a case brought under the criminal analog to the FCA, 18 U.S.C. § 287, is to the same effect. There, the contractor was convicted for falsifying the educational credentials of its employees in order to receive payment from the United States at a special premium rate. Under the applicable

regulation, the contractor would have been entitled to the premium without regard to the employees' educational attainments had the contractor had demonstrated, prior to billing the Government, that the employees possessed certain "special qualifications." The court held, however, that even if the employees met the special qualifications criteria and that the Government ultimately got its "moneys' worth," that would not be a defense to the FCA indictment. 657 F.2d at 634, 635.[26]

The lesson of these cases is plain. The United States is entitled to define the substantive and procedural conditions that must be met before federal funds will be committed, be it to a food stamp applicant or to a defense contractor. And, if a claimant cannot (or believes it cannot) meet those conditions and deceives the Government as to its having met those conditions, the claimant commits a fraud that "*might* result in financial loss to the Government," *Neifert-White, supra*, 390 U.S. at 292—and hence one that is actionable under the FCA—even if, in a particular case, the claimant is able to prove *ex post* that a fully-informed Government would have made the same payment in any event.

The contracting conditions—including the competitive bidding requirement in *Rohleder* or the educational attainment condition in *Blecker*—may be designed to conserve the resources of the public fisc over the long term. Or the conditions may be designed to further other social ends, as in the cases cited by the United States in its brief *amicus curiae*. In either event, the FCA requires those making claims on the Government to deal honestly with

[26] *See also United States v. National Wholesalers*, 236 F.2d 944 (9th Cir. 1956), *cert. denied*, 353 U.S. 930 (1957) (finding contractor liable under the FCA for representing to the Government that the goods it was supplying were of a particular brand required by the contract when in fact the contractor had manufactured copies of the required brand; the fact that the copied goods supplied to the Government were determined—after testing conducted upon discovery of the contractor's deception—to have performed precisely as well as the brand required by the contract provided no defense to the contractor).

the Government in representing their entitlement to the Government's money so that the Government can rely on such representations rather than having to incur the burden of independently investigating each such representation.

None of this is to say that an FCA case can be predicated on any and all false statements made to the United States. Rather, as the text of the Act makes plain, the FCA reaches such statements only if made in connection with a "claim" which is defined as a "request or demand . . . for money or property." 31 U.S.C. § 3729(c).[27] And, in accordance with the common law understanding of "fraud," the FCA has been interpreted to impose liability only with respect to *material* false statements, *e.g.*, *United States v. Data Translation Inc.*, 984 F.2d 1256, 1267 (1st Cir. 1992) (Breyer, J.)—*viz.*, statements that are relevant to, and hence capable of affecting, the Government's decision to pay a claim.[28]

B. Hughes contends that its failure to include in its Disclosure Statement any information about the allocation of RDP development costs to the B-2 contract did not ultimately cause the Government to pay increased costs. Whether or not that is true—and the Ninth Circuit specifically found that Hughes' noncompliance with the disclosure regulations "may have rendered" certain costs "unallowable," Pet. App. 25a[29]—it is undisputed that Hughes

[27] The decisions of this Court, and of the courts of appeals, cited by Hughes, Pet. Br. at 40-41, say no more than that which is undisputed here: that a false statement is actionable under the FCA only if made to obtain money or property belonging to the Government.

[28] *Cf. Kungys v. United States*, 485 U.S. 759, 770 (1988) ("The federal courts have long displayed a quite uniform understanding of the 'materliality' concept . . . The most common formulation of that understanding is that a concealment or misrepresentation is material if it 'has a natural tendency to influence, or was capable of influencing, the decision of' the decision-making body to which it was addressed").

[29] Given the Ninth Circuit's finding, as quoted in text, Hughes was not entitled to summary judgment here even on its own (*post-hoc*) test for determining whether the FCA has been violated.

was required, as a "condition of contracting," to accurately disclose its "cost allocation practices," 41 U.S.C. § 422(h)(1)(A), and that Hughes knowingly failed to do so. And, it is equally plain that the cost allocation disclosure is required, pursuant to an Act of Congress, precisely because

> In the absence of complete and accurate information about the cost of a contract, the Federal Government has no way of knowing whether the contractor's profits are excessively large or whether the final price is a fair price. Negotiation is thus meaningless in the absence of a clear understanding of the costs involved.
>
> * * * *
>
> In most practical cost accounting situations, there are a variety of methods for allocating overhead expenses. Thus, the determination of the "true" cost of producing a given weapons system depends mainly on the particular cost accounting methods selected

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Recognizing this, Hughes attacks the Ninth Circuit's determination on allowability, principally on the asserted ground that the contracting officer made a "determination" that Hughes' costs were "allowable" and that it is "black-letter government-contracts law" that such a determination, combined with payment of that cost, "'binds the Government so that no challenge to the allowability of the cost can be maintained.'" Pet. Br. at 43-44 n.26, *quoting* J. Cibinic & R. Nash, *Cost-Reimbursement Contracting* 1106 (2d ed. 1993).

Hughes' argument is trebly flawed.

First, as the United States explains in its brief *amicus curiae*, the contracting officer did not make a "decision" on allowability of the type sufficient to bind the Government.

Second, while the contracting officer released the funds, he did so only upon making an express *reservation* of the Government's right to recover the funds in a separate court action. *See* J.A. 136.

Third, even if the contracting officer had made the requisite determination and released the funds without reservation, the "black-letter" rule which Hughes invokes is applicable, according to the very treatise cited by Hughes, only "[b]arring fraud, mistake, or lack of authority." J. Cibinic & R. Nash, *supra*, at 1105. Here, fraud is, of course, alleged.

> to allocate overhead expense. [S. Rep. No. 890, 91st Cong. 2d Sess. (1970)]

The requirement that contractors disclose their cost allocation system and bill only in accordance with that (disclosed) system is thus analogous to the requirement in *Rohleder*, *supra*, that the contractor competitively bid subcontracts and bill only for competitively-bid subcontractor costs. The CASB Disclosure Statement requirement, like the competitive bidding requirement in *Rohleder*, can be violated in a particular case without ultimately causing the United States to overpay, but the Disclosure Statement requirement, like the requirement in *Rohleder*, unmistakably serves to protect the Government's fiscal interests in the long run. And, because the purpose of the Disclosure Statement requirement is to protect the public fisc, false Disclosure Statements lie at the very core of false statements that can form the predicate for FCA cases.[30]

C. Hughes finally contends that the Ninth Circuit erred even in reaching Schumer's "allegation of inadequate disclosure to the Government." Pet. Br. 44. Relying on a statement by the Ninth Circuit, Hughes contends that "Schumer had first presented this allegation in his brief in opposition to summary judgment." Pet. Br. 44 (citing Pet. App. at 22a). And, from this premise, Hughes argues that the Ninth Circuit was wrong in holding that the district court "should [have] treated the filing as a request to amend the pleadings," and that, "[o]n remand, [Schumer's] complaint should be considered so amended." Pet. App. 22a-23a. As we proceed to show, Hughes' argument is

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[30] If, on remand, further factual development confirms Hughes' (premature, *see supra* at n.29) view that no "unallowable" costs were incurred as a result of Hughes' Disclosure Statement violation, Schumer, of course, will not be able to recover actual damages on behalf of the Government for the contract payments made to Hughes. But, the Government may have suffered other compensable injuries, such as the added costs incurred in auditing Hughes as a result of the Disclosure Statement violation. And, in any event, an inability to prove actual damages would not preclude a recovery of statutory penalties on the Government's behalf.

based on both a false premise and a misunderstanding of the decision below.

1. To begin with, the Complaint here did, in fact, encompass the issue of inadequate disclosure to the Government.[31] In particular, both the initial and amended complaints alleged that Hughes had "suppressed or concealed" information about its commonality cost allocation system from the Government, as well as from Northrop. P. 1 & n.2 *supra*. Given that "the core purpose of the complaint is to put the defendant and the court on notice of the plaintiff's claims," *Conley v. Gibson*, 355 U.S. 41, 47 (1957), those allegations were sufficient to raise the disclosure issues.

Indeed, Hughes well understood *prior* to its summary judgment motion that these allegations in the complaint encompassed Schumer's CASB Disclosure Statement claim; Hughes in fact *anticipated* the Disclosure Statement issue in its moving papers. *See supra* at n.7.

It is also very much to the point in this regard that almost a year before Hughes brought its summary judgment motion and before discovery had begun in earnest, Schumer's then-counsel said the following in open court in the presence of Hughes' counsel:

> Your honor, under the Cost Accounting Standards Board there is a Disclosure Statement filed under penalty of perjury for contracts in excess of ten mil-

[31] The Ninth Circuit's contrary view appears to have stemmed from its lumping together of the Disclosure Statement issue with an analytically distinct issue—the CAS 401 issue, *see supra* at n.7. Schumer concededly *did* raise the CAS 401 issue for the first time in opposition to summary judgment. But the procedural defect with respect to the CAS 401 claim—if it was one—is of no moment here inasmuch as the Ninth Circuit reached the merits of the CAS 401 claim and decided it in *Hughes'* favor. Pet. App. 25a. In the district court, Hughes implicitly recognized that the CAS 401 issue was the only new issue when, in its Reply Brief in support of its summary judgment motion, Hughes attacked only the addition of the CAS 401 claim and not the Disclosure Statement claim. *See supra* at n.7.

> lion dollars where an aerospace contractor is required to reveal the method in which it will accumulate and allocate costs, *and that is what this case is all about*. [J.A. 123-24 (emphasis added).]

Against this background, Hughes' suggestion that Schumer's allegations here were "an ever-moving target," Pet. Br. at 45—or that Schumer was engaged in a "ceaseless game of cat-and-mouse," *id.*—is simply wrong.

2. In light of the foregoing, even if the Complaint here were not sufficient to raise the disclosure claims, the Ninth Circuit still would have been correct in reaching the merits of those claims. For it is well-settled that courts can "treat the pleading as though it were amended to conform to the facts set forth in the affidavits" in opposition to a summary judgment motion and, indeed, that "it is often . . . desirable" to do just that. 6 J. Moore, *Moore's Federal Practice*, ¶ 56.10 & cases cited therein.

In this case—in which the disclosure issues had been termed the heart of the case by Schumer's counsel almost a year before Hughes moved for summary judgment and in which those issues were briefed by Hughes on the motion for summary judgment—the court of appeals was surely correct in treating this as a case in which a proper exercise of that discretion called for treating the pleadings as amended by the opposition to summary judgment.[32]

[32] Hughes would read the decision below as standing for the sweeping proposition that district courts are required *in every case* to consider a plaintiff's papers in opposition to summary judgment as *de facto* amended complaints. *See* Pet. Br. at 44-45. In context, however—and as shown by the Ninth Circuit cases cited in that decision, Pet. App. 22a-23a—the court of appeals' determination that it was proper to reach the merits here was based upon the facts and circumstances of *this* case.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

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Supreme Court of the United States

OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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A casual reader of the briefs filed by Schumer and his *amici* might suppose that the question presented here is whether fraud against the Government is good or bad. That is obviously not so. Rather, the question is whether the Ninth Circuit erred by extending the False Claims Act beyond all bounds of language and logic, transforming a well-intentioned statute into an instrument of abuse. Although Schumer takes pains to distance himself from the opinion below and to divert attention from the facts at hand, his interpretation of the statute is both implausible in theory and unworkable in practice.

I. SCHUMER'S RETROACTIVITY ANALYSIS IS WRONG.

A. At the broadest level, Schumer suggests that the traditional presumption against retroactivity does not apply here because the 1986 amendments to the FCA's *qui tam* bar neither (1) prohibited previously lawful conduct, nor (2) increased the penalty for unlawful conduct. *See* Resp. Br. at 15. That sweeping suggestion (echoed by the United States, *see* U.S. Br. at 16-17) is incorrect. The presumption against retroactivity applies to all statutes that alter the "legal consequences" of conduct. *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1499 (1994). There is no basis in principle or precedent for limiting the "legal consequences" of conduct to Schumer's two discrete categories. To the contrary, the *Landgraf* Court expressly rejected any such "mechanical" approach. *Id.* at 1498. Many laws that do not fall into either category—including those that eliminate defenses such as statutes of limitations or contributory negligence—have long been recognized to fall within the scope of the presumption. *See* Pet. Br. at 22; *Winfree v. Northern Pac. Ry. Co.*, 227 U.S. 296, 302 (1913).

B. Schumer's retroactivity argument thus boils down to the proposition that there is no relevant difference between enforcement of the law by the Government and by private parties. *See* Resp. Br. at 17-18. That proposition is untenable. "[A] suit by a private party is obviously quite different from the government's direct enforcement of its own laws." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777

(1986). The difference is one not merely of degree, but of kind. Private *qui tam* relators act "under the strong stimulus of personal ill will or the hope of gain." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943) (internal quotation omitted). They have only one goal: to maximize their bounty. The Government, in contrast, must take into account the broader public interests at stake. *See* Pet. Br. at 17. The Government's vast array of enforcement powers also enables it to enforce any particular law with a degree of flexibility and discretion that a private party cannot. *See e.g., Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60-61 (1987). Public law enforcement, thus, has long been governed by different legal rules than private law enforcement. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 168 (1992); *INS v. Hibi*, 414 U.S. 5, 8 (1973) *(per curiam)*. A statute subjecting a defendant to suit by private parties differs in both fact and law from a statute subjecting the defendant to suit by the Government alone.

The facts of this case well illustrate the point. The Government investigated the underlying allegations of wrongdoing at great length. That investigation persuaded government officials that no FCA action was either necessary or appropriate; a technical noncompliance with accounting disclosure requirements did not then (and does not now) warrant sanctions. *See* 4 C.F.R. § 331.71(b)(2) (1982); 48 C.F.R. § 30.602-2(d)(3) (1996). Accordingly, the professional law enforcement authorities who reviewed this lawsuit declined to intervene. *See* J.A. at 103-05. It is hard to imagine a more compelling example of the fundamental distinction between private and public enforcement of the law; this case would not *exist* but for the 1986 amendments expanding private enforcement of the FCA. Schumer thus misses the point by declaring that those amendments cannot be distinguished from laws increasing the *Government's* enforcement powers. *See* Resp. Br. at 18.

Retroactive application of the amended *qui tam* bar, indeed, would unfairly defeat the expectations of regulated parties. Before 1986, contractors had less incentive to devote resources to preventing the sort of technical transgressions alleged here. *Cf. Landgraf*, 114 S. Ct. at 1506 n.35. Under settled regulatory understandings, the Government would not bring an FCA action based upon such technical transgressions, and a contractor could preclude frivolous *qui tam* suits by voluntarily disclosing actual or potential contract irregularities to the Government. *Cf. Gwaltney*, 484 U.S. at 60-61.

Schumer errs, then, by contending that a new law subjecting a defendant to lawsuits by *everyone* has no "legal consequences" as long as that defendant previously could have been sued by *someone*. A new or expanded private right of action should not be applied to past conduct in the absence of a clear indication that "Congress itself has affirmatively considered the potential unfairness . . . and determined that it is an acceptable price to pay for the countervailing benefits." *Landgraf*, 114 S. Ct. at 1501.

C. The United States (but, notably, not Schumer) argues that this case raises no retroactivity issue because the 1986 FCA amendments regulate only "the conduct of *qui tam* litigation" rather than "the primary conduct" that is the subject of such litigation. U.S. Br. at 16. The United States thus seeks to place this case within the line of precedent holding that courts generally apply new rules of *procedure* in all pending and future cases, regardless of whether the underlying conduct preceded the rules' enactment. *See, e.g., Landgraf*, 114 S. Ct. at 1502 & n.29.

The short answer to this argument is that the amended *qui tam* bar is *not* a rule of procedure. That provision does not govern "the *manner* in which litigation is conducted," U.S. Br. at 10 (emphasis added), but whether such litigation can be filed in the first place. The point of expanding private enforcement of the FCA was to regulate not the litigation conduct of FCA *plaintiffs*, but rather the underlying conduct of FCA *defendants*.

For retroactivity purposes, thus, the relevant—or "primary"—conduct is not the act of filing a *qui tam* lawsuit, but instead the conduct on which that lawsuit is based. *See Landgraf*, 114 S. Ct. at 1502; *id.* at 1524-26 & n.3 (Scalia, J., concurring in judgment); *cf.* Pet. Br. at 16 n.4.

Indeed, the United States (and, for that matter, Schumer) concedes that the fact that the amended *qui tam* bar is phrased in "jurisdictional" terms does not negate the presumption against retroactivity. *See* U.S. Br. at 14-15; Resp. Br. at 16 n.12. Because the purpose of the amendment, like the purpose of a statute expanding "jurisdiction" to award punitive damages, was to promote the detection, deterrence, and punishment of wrongdoing, the amended bar should not apply in cases challenging past conduct. *Cf. Landgraf*, 114 S. Ct. at 1505-06. Fixation on the magic word "jurisdiction" is no substitute for analysis of the amendment's substantive import.

II. SCHUMER'S INTERPRETATION OF "PUBLIC DISCLOSURE" IS WRONG.

A. Schumer next asserts that, as a matter of law, no "public disclosure" occurs within the meaning of the post-1986 *qui tam* bar unless the Government or the news media discloses the relevant allegations or transactions to "*any and all* members of the public." Resp. Br. at 9, 21 (emphasis added); *see also id.* at 25, 28 ("public disclosure" requires disclosure to "the public at large"). Even the Ninth Circuit did not go nearly so far;[1] indeed, Schumer can cite *no court* that has so interpreted the statute. Under Schumer's interpretation, the amended *qui tam* bar authorizes not only "whistleblower" actions that bring to light previously undisclosed fraud, but also "parasitic" actions based on information previously disclosed by the Government. That interpretation is not only unsupported by the text, history, or purpose of the statute, but is unworkable in practice.

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[1] The Ninth Circuit held only that no "public disclosure" occurs when the Government discloses allegations of wrongdoing to a contractor's "innocent employees." *See* Pet. App. at 8a-11a.

1. Schumer's textual analysis is superficial at best. He begins—as he must—by conceding that the term "public disclosure" is not self-defining, but "'susceptible to a range of plausible meanings.'" *See* Resp. Br. at 20 (quoting Pet. Br. at 25); *see also id.* at 30. He gives no reason, however, why the text supports his particular interpretation. Indeed, he fails to address the most glaring textual flaw in his argument: the *qui tam* bar does not refer to "public disclosure" in the abstract, but rather to "public disclosure" from several specified sources, *many—if not most—of which are not disseminated to "any and all members of the public."* *See* Pet. Br. at 25. It is implausible, to say the least, that Congress meant to require the disclosure of information to "the public at large" while specifying particular sources of information—such as government "audits" or "investigations"—that are *not* disclosed to the public at large.

In contrast, Hughes' interpretation of "public disclosure" takes into account the term's statutory context: a "public disclosure" occurs when information from one of the specified sources is disclosed to a member of the public with no prior knowledge thereof (*i.e.*, a "stranger to the fraud"). *See* Pet. Br. at 25-26; *see also United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322 (2d Cir. 1992). The sum and substance of Schumer's textual argument consists of two feeble challenges to that interpretation.

First, Schumer argues that Hughes' interpretation of "public disclosure" is "unprincipled" because it is limited to disclosure to "'members of the public *with no prior knowledge* [of the alleged wrongdoing],' *viz.*, to 'strangers to the fraud.'" Resp. Br. at 34 n.22, 33 (quoting Pet. Br. at 25-26). Indeed, Schumer chides Hughes for "never deign[ing] to explain why, on its view of the law, communications with those particular individuals within a corporate organization who have prior knowledge do not constitute 'public disclosure' whereas communications with 'strangers to the fraud' do." *Id.* at 34. But the explanation is implicit in the language of the statute: a

"public disclosure" occurs only when information is revealed to a member of the public with no prior knowledge thereof because a "disclosure" occurs only when information is revealed to someone who does not already know it. *See, e.g.*, Webster's Third New International Dictionary 645 (1976) (defining "disclose" as "to make known" or "to divulge"). An alleged fraud simply cannot be "disclosed" to a member of the public who already knows about it. *See, e.g., EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 603 (1981); *id.* at 607 (Stevens, J., dissenting).

Second, Schumer argues that Hughes' interpretation "treat[s] all disclosure as *ipso facto* public," and thereby renders superfluous the word "public." *See* Resp. Br. at 9, 21-22. Schumer is wrong. The word "public" establishes that a disclosure *within* the Government will not bar a *qui tam* action; "one government employee telling another government employee is not *public* disclosure." *United States ex rel. Hagood v. Sonoma Cty. Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991) (emphasis added). Thus, the mere disclosure of a particular allegation or transaction in a government audit or investigation is not a *public* disclosure; the statute requires disclosure of such an allegation or transaction to a member of the public. The canon that a court should try to give every word in a statute *some* meaning does not require a court to give every word its *broadest possible* meaning. *Cf. Walters v. Metropolitan Educ. Enters., Inc.*, 65 U.S.L.W. 4059, 4061 (U.S. Jan. 14, 1997).[2]

2. After his brief dalliance with the statute's text, Schumer quickly retreats to its legislative history in search of support for his unprecedented interpretation of the *qui tam* bar. *See* Resp. Br. at 22-25. But that history is no more helpful to his cause.

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[2] Schumer makes no effort to address Hughes' textual argument that his interpretation of "public disclosure" in the *qui tam* bar would render absurd an identically-worded provision in the Major Fraud Act, 18 U.S.C. § 1031(g)(2)(C). *See* Pet. Br. at 32-33.

Schumer is unable to extract from the extensive history *any* statement—whether from a committee report or even from an individual legislator—endorsing his view that "public disclosure" requires disclosure to "any and all members of the public." Rather, Schumer concocts an elaborate theory based on inferences drawn from the twists and turns of the legislative drafting process. That theory should be rejected not only because it is improper to construe a statute based upon such speculative inferences, but also because other portions of the legislative history directly refute it.

Although the Members of this Court have expressed differing views about the proper role of legislative history in statutory interpretation, *compare Conroy v. Aniskoff*, 507 U.S. 511, 518 n. 12 (1993) *with id.* at 518-19 (Scalia, J., concurring in judgment), it is common ground that some forms of legislative history are less reliable indicia of congressional intent than others. Statements in floor debates, for example, are substantially less reliable than statements in committee reports. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984). Perhaps the *least* reliable form of legislative history is the form on which Schumer relies—mere inferences from the drafting history of a bill, unsupported by any contemporaneous explanation of the reason for the insertion or deletion of particular words. Schumer's convoluted and speculative theory represents the very misuse of legislative history that tends to bring the entire venture into disrepute.

Schumer cites no statement in the legislative history even *hinting* that the word "public" was added to limit the *qui tam* bar to actions based upon information disclosed to the "public at large." To the contrary, Senator Grassley, sponsor of the bill and author of the *qui tam* bar ultimately enacted into law, indicated that he perceived *no* distinction between a "disclosure" and a "public disclosure." He was also the author of a provision (which ultimately became 31 U.S.C. § 3730(d)(1)) limiting the recovery of "original sources" in *qui tam* actions taken over by the Government. This "knock

down" provision mirrors the language of the *qui tam* bar, except that it does not include the word "public" before the word "disclosure." *Compare* 31 U.S.C. § 3730(e)(4) *with id.* § 3730(d)(1). Nonetheless, Senator Grassley stated that both provisions apply to actions based on "publicly disclosed" information, attributing *no* meaning to the use of the adjective "public" in the one subsection but not the other.[3] Schumer's fanciful theory that the meaning of the *qui tam* bar can be derived from the appearance of the word "public" in the final stages of the drafting process thus collides head-on with the contemporaneous statements of the very legislator responsible for the changes.[4] It is hardly surprising, accordingly, that no analyst of the legislative history has ever before drawn Schumer's speculative inferences from the drafting process.[5]

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[3] Senator Grassley described the interplay between the two provisions as follows: "When the *qui tam* plaintiff brings an action based on *public information*, meaning he is an 'original source' within the definition under the act, but the action is based primarily on *public information* not originally provided by the *qui tam* plaintiff, he is limited to a recovery of not more than 10 percent. In other words, a 10-percent cap is placed on those 'original sources' who bring cases based on information already *publicly disclosed* where only an insignificant amount of that information stemmed from that original source." 132 Cong. Rec. at 28,580 (Oct. 3, 1986) (statement of Sen. Grassley) (emphasis added); *see also id.* at 20,536 (Aug. 11, 1986) (statement of Sen. Grassley); *cf. id.* at 29,322 (Oct. 7, 1986) (stating that § 3730(d)(1) applies only to original sources).

[4] Schumer's theory also fails on its own terms. It is premised on the self-serving assumption that all of the sources of information listed in the *qui tam* bar before the insertion of the word "public"—such as Government Accounting Office reports and administrative hearings—"by their very nature" involve disclosure to the public at large, whereas those added later do not. Resp. Br. at 24. That assumption has no basis in law or fact.

[5] To the contrary, commentators who have carefully analyzed the legislative history agree with Hughes that "public disclosure" means disclosure to a member of the public who is a stranger to the fraud. *See* Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 Pub. Cont. L. J. 237, 250-57, 261-62 (continued...)

3. Having failed to find support for his interpretation of the *qui tam* bar in the FCA's text or history, Schumer next resorts to the statute's "underlying policies." Resp. Br. at 25. Here again, his efforts are in vain.

Schumer contends that the point of the *qui tam* bar is not to preclude "parasitic" lawsuits, but instead to "generate pressure on the Executive Branch to respond to . . . allegations [of wrongdoing] with vigor, and mak[e] lack of vigor a matter for public censure." Resp. Br. at 28. That contention is far-fetched at best. The FCA is not an ethics-in-government act. If Congress had been concerned about dishonesty or sloth in the Executive Branch, it surely could have addressed those problems in a more direct and effective way than authorizing a windfall for "parasitic" *qui tam* relators.[6]

The main problem with Schumer's theory, thus, is that it fails to explain why Congress would have wanted to authorize "parasitic" *qui tam* actions except when based upon information disclosed to "any and all members of the public." It is not "any and all members of the public" who typically file *qui tam* actions, after all, but rather those members of the public—particularly the employees of government contractors—who have specialized knowledge about a contractor's practices. The FCA's *qui tam* enforcement

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[5](...continued)
(1995); Vogel, *The Public Disclosure Bar Against Qui Tam Suits*, 24 Pub. Cont. L.J. 477, 481-91, 506-11, 513 (1995).

[6] Schumer also makes the uncontroversial point that Congress was concerned about the Justice Department's resources, *see* Resp. Br. at 26-27, but that concern in no way supports his interpretation of the *qui tam* bar. Scrutiny of the Justice Department by "the public at large" might help prevent official dereliction of duty, but would not remedy a lack of resources. If Congress had been primarily concerned with increasing private enforcement of the FCA, rather than preventing "parasitic" actions, it would simply have abolished the *qui tam* bar outright. Instead, Congress retained the *qui tam* bar and enacted the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. § 3801 *et seq.*, which authorized federal agencies to pursue administrative remedies against fraud.

mechanism creates a monetary incentive for such private "whistleblowers" to expose fraud against the Government, not a windfall for "parasitic" relators who seek to capitalize on allegations of wrongdoing already disclosed by the Government or news media. *See, e.g., United States ex rel. Findley v. FPC-Boron Employees' Club*, 1997 WL 24258, at *8 (D.C. Cir. Jan. 24, 1997); *Doe*, 960 F.2d at 322. Once the Government is on the trail of an alleged fraud—as evidenced by disclosure to a member of the public of the underlying allegations or transactions from one of the sources specified in the statute—a spin-off *qui tam* action contributes nothing of value.[7] The *qui tam* bar thus precludes such "parasitic" actions unless the relator is an "original source" of the information, *i.e.*, a "whistleblower."

Schumer asserts that Hughes' interpretation of the *qui tam* bar would in effect "reimpose" the "government possession" standard replaced in 1986 by the "public disclosure" standard. *See* Resp. Br. at 28. That assertion is baseless. The Government possesses vast amounts of information, much of which it may not understand or even know about. Congress relaxed the "government possession" standard in 1986 to prevent the mere presence of information in government files—unaccompanied by any investigatory or enforcement efforts—from precluding a *qui tam* suit based on that information. *See* Pet. Br. at 28-29, 33-34; *Findley*, 1997 WL

[7] The United States explains this point well in its brief: "In the circumstances specified in the statute—particularly where there has been a public disclosure through specified types of government reports and actions—it is likely that the government is already investigating the matter, or appropriate government investigatory personnel have sufficient information to trigger an investigation. Unless the relator is an 'original source,' *qui tam* lawsuits brought in these circumstances—after a public disclosure has occurred showing that the government is itself taking action or is capable of taking action—are likely to bring the Treasury nothing more than what government prosecutors would have recovered on their own initiative, and they divert a portion of that recovery unnecessarily from the Treasury to private hands." U.S. Br. at 19-20 n.12.

24258, at *9. The "public disclosure" standard ensures that government *inaction* will not bar an otherwise valid *qui tam* lawsuit.[8] There is nothing, however, to suggest that the "public disclosure" standard was meant to abolish the traditional bar against "parasitic" *qui tam* actions. To the contrary, courts and commentators agree that the "public disclosure" bar preserves the FCA's traditional (and commonsense) distinction between "whistleblower" and "parasitic" actions. *See* Pet. Br. at 31.

In the final analysis, Schumer's "purpose" theory consists of nothing more than platitudes about the Government's need to enlist the assistance of private parties in the fight against fraud. *See* Resp. Br. at 25-27. That discussion may help explain why Congress chose to enact the FCA's extraordinary *qui tam* enforcement mechanism in the first place, but it fails to explain why Congress would have chosen to authorize *qui tam* actions not only by relators who blow the whistle on fraud but also by opportunists who seek to give the whistle "a second toot." *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992).

4. Finally, Schumer's theory that "public disclosure" requires disclosure to "any and all members of the public" or to "the public at large" is wholly unworkable in practice. Schumer indulges in gargantuan understatement when he admits that his theory fails to clarify "the precise metes and bounds of 'public disclosure.'" Resp. Br. at 9, 21. He does not even *begin* to explain what disclosure to "any and all members of the public" or to "the public at large" entails as a real-world matter. Just how broadly must such information be disseminated? Presumably, Schumer would not require the

[8] Schumer insists that his interpretation of "public disclosure" is necessary to guard against "the danger that the Government will *fail to act* and that its *inaction* will go unnoticed." Resp. Br. at 28 (emphasis added). But Congress addressed this danger not by requiring disclosure to "the public at large," but by requiring "public disclosure" of information from a source (*e.g.*, an "audit" or "investigation") indicating that the Government is "on the trail of the alleged fraud without [a relator's] assistance." *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995).

Government to send out a nationwide mailing of its audit reports or investigations. But he never discloses just how "public" the requisite "public disclosure" must be to satisfy his theory, other than to insist that disclosure to any member of the public (as Hughes advocates) is not "public" enough.[9]

It is unlikely at best that Congress would have established such an open-ended standard to govern the threshold inquiry into a relator's authority to bring a *qui tam* action at all. In interpreting the "public disclosure" bar, thus, the lower courts have recoiled from any attempt to "evaluate the quality and quantity of information in the public domain." *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1005 (10th Cir. 1996). The reason is obvious: "courts should not be compelled to have 'a trial before the trial' on how 'public' the information is." Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 Pub. Cont. L. J. 237, 265 (1995). In contrast to Hughes' workable, bright-line rule, Schumer's theory would saddle the courts with the unenviable task of determining just how "public" a particular "disclosure" had been, without any intelligible principle to govern that intractable inquiry.

Although it is hard to discern what Schumer means by disclosure to "the public at large," it is clear at the very least that his theory does *not* include disclosure to a government contractor's "innocent employees." As a practical matter, thus,

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[9] Schumer appears to concede that *actual* disclosure to the public at large is not necessary, as long as the relevant information is "*open* to the public at large." Resp. Br. at 9, 21, 25, 27-29 (emphasis added). He does not, however, explain (1) what it means for information to be "open" to "the public at large," or (2) how the mere availability of information (*e.g.*, in "any repository of documents or records open to the general public," Resp. Br. at 29) corresponds with his theory that the purpose of the "public disclosure" bar is to ensure active public scrutiny of Executive Branch officials.

his theory leads to the same result as the Ninth Circuit's theory: it would allow a contractor's employees to file "parasitic" *qui tam* suits at will based on information disclosed by the Government during an audit or investigation. *See* Pet. Br. at 36-37. If either theory were accepted, every government audit or investigation would likely spin off its own "parasitic" *qui tam* action, thereby rewarding opportunistic relators at the expense of the public fisc.[10]

B. In a fallback argument, Schumer acknowledges that a "public disclosure" can entail disclosure to even a single member of the public, but adds the caveat that any such disclosure must be made to that person "*as a member of the public.*" Resp. Br. at 9, 21, 32 (emphasis added); *see generally id.* at 30-33. While this position is less ambitious than his principal argument, it is also less coherent in theory and less workable in practice. It does, however, allow Schumer to arrive at the Ninth Circuit's result without endorsing the Ninth Circuit's reasoning: disclosure to a contractor's employees fails to qualify as a "public disclosure" not because (as the Ninth Circuit asserted) such employees are "unrealistic" *qui tam* relators, but instead because such disclosure is made to those employees "*qua* employees" and not "*qua* members of the public." *Id.* at 30.

This fallback argument is so flimsy that it defies coherent articulation. Information is not disclosed to a member of the public "*qua* member of the public," Schumer asserts, if it

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[10] Schumer attempts to make his theory more palatable by emphasizing that a relator's recovery is capped at 10% (and may be eliminated altogether) in a case based primarily on the disclosure of information from one of the sources specified in the *qui tam* bar. *See* Resp. Br. at 38 (citing 31 U.S.C. § 3730(d)(1)). But that provision applies only in the rare case where (1) the Government intervenes in the action, and (2) the relator is an "original source," *see supra* pp. 7-8 and note 3. If anything, Congress' decision to limit the recovery of "original sources" in the most meritorious cases (those in which the Government intervenes) refutes the suggestion that Congress intended to authorize a plenary recovery for "parasitic" relators in the weakest cases (those in which the Government declines to intervene).

involves "communications between two parties who have a *particular kind* of on-going relationship about matters *within the scope* of that relationship and as an *integral part* of that relationship." Resp. Br. at 30 (emphasis added); *see also id.* at 21 (member of the public not member of the public *as such* when employed by "an entity with whom *[sic]* the Government has a *special relationship"*) (emphasis added); *id.* at 32 (member of the public not member of the public *as such* when "he or she has *some special capacity*" or a "*protected relationship*" with the Government) (emphasis added).

To state this argument is to refute it. The very notion of distinguishing a member of the public from a member of the public "*as such*," Resp. Br. at 32 (emphasis added), is absurd. And whatever the meaning of this ill-defined argument in *theory*, it clearly does not provide courts with anything approaching a workable standard to apply in *practice*.

The United States advances a related argument. While purporting to endorse Hughes' interpretation of the *qui tam* bar, *see* U.S. Br. at 19-20, the Government proposes an exception that would convert Hughes' bright-line rule into a "functional test." *Id.* at 22. Disclosure to a member of the public qualifies as a "public disclosure," the Government asserts, only insofar as "that person is under no *duty* not to reveal the information to others." *Id.* at 19 (emphasis added). The United States fails, however, to explain either the source or the nature of this "duty." Is it a *legal* duty? If so, does it arise out of federal law, state law, or contract? Is it a *moral* duty? Does it depend, as the United States implies, on the "understanding" of the person to whom the disclosure is made? *Id.* at 21.[11]

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[11] Schumer candidly admits that, under his similar fallback argument, no "public disclosure" takes place when the Government discloses information to members of the public who "may well *feel* a duty—*or at least a sense*—of loyalty to their employer." Resp. Br. at 33 (emphasis added). Such a "feeling"-based analysis, however, involves the application not of law but of pop psychology.

These questions have no answer because the United States' "duty" requirement is made up out of whole cloth. The Government makes no pretense that the requirement has any basis in the statute's text or history, and the requirement does not remotely correspond with what the Government itself identifies as the *qui tam* bar's purpose of precluding private enforcement actions where the Government has launched investigatory or enforcement efforts, *see* U.S. Br. at 19-20 n.12 (quoted *supra* note 7).[12] Indeed, the law recognizes no "duty" to conceal evidence of fraud. *See, e.g.*, Restatement (Second) of Agency § 395 cmt. f (1958). To the contrary, the law has long imposed an affirmative duty to *report* such evidence. *See, e.g., Roberts v. United States,* 445 U.S. 552, 557-58 (1980); *Branzburg v. Hayes*, 408 U.S. 665, 696-97 (1972). The whole point of the FCA's *qui tam* enforcement mechanism, of course, is to encourage private parties to fulfill that duty.[13]

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[12] Although the United States purports to base its analysis on the existence *vel non* of a "duty" not to disclose information, its conclusion appears to rest on the *factual* premise that the disclosures in this case were made only to "the company itself," rather than to "the individual employees *qua* individuals." U.S. Br. at 21. That premise is baseless. When conducting the audits and investigation in this case, the Government did not contact "the company" in the abstract, but instead communicated directly with numerous Hughes employees. *See, e.g.*, Pet. Br. at 8; J.A. at 48, 50-53, 64, 106-07, 132, 165-75. There is nothing in the record to suggest that Hughes limited the Government's contacts to a few select individuals "designated by Hughes management." U.S. Br. at 20. To the contrary, much of the information disclosed to the employees was not restricted either by the Government or by Hughes. *See, e.g.*, J.A. at 163-64, 168. (Indeed, Hughes placed *in the company library* its internal "contact report" detailing the allegations at issue. *See* J.A. at 54.) It is worth noting, in this regard, that the *qui tam* bar applies regardless of *who* makes the relevant "public disclosure," as long as the "facts or allegations" disclosed are from one of the specified sources—*i.e.*, the *Government* need not make the disclosure.

[13] Thus, the FCA not only offers "whistleblowers" a potentially lucrative *qui tam* recovery, but allows them to keep confidential the information reported, *see* 31 U.S.C. § 3730(b)(2), and protects them against retaliation, *see id.* § 3730(h).

III. SCHUMER'S INTERPRETATION OF "FALSE CLAIM" IS WRONG.

A. On the merits, Schumer insists that his challenge to Hughes' *disclosure* of its accounting practices presents a genuine issue of material fact under the FCA even though his challenge to those accounting practices themselves does not. *See* Resp. Br. at 39-47. Again, he is wrong.

1. Schumer's argument is most notable for what it does *not* say. Schumer makes no effort to defend the Ninth Circuit's holding that "the lack of a determination of actual harm from [noncompliance with disclosure obligations] does not preclude a claim under the FCA." Pet. App. at 25a (citing *Rex Trailer Co. v. United States*, 350 U.S. 148, 152 (1956), and *United States v. Kensington Hosp.*, 760 F. Supp. 1120, 1127 (E.D. Pa. 1991)). That holding ignores the basic distinction between "damages" and "injury." To say (as this Court did in *Rex Trailer*) that alleged misconduct falls within the FCA's scope regardless of whether a plaintiff can prove "specific damages" is not to say that such misconduct falls within the FCA's scope regardless of whether it is capable of causing *injury* to the public fisc. The FCA does not proscribe any and all statutory, regulatory, or contractual infractions by a government contractor. An alleged infraction simply does not entail a "false claim" if—at the very least—it does not entail a request for government money or property to which the claimant is not entitled. And without a "false claim," of course, there can be no liability under the FCA.

2. In contrast to the Ninth Circuit, Schumer purports to recognize that an infraction falls within the FCA's scope only if it involves a "claim" for government money or property. *See* Resp. Br. at 45. That is correct, as far as it goes. But the relevant "claim," in addition, must be "false" or "fraudulent." *See* 31 U.S.C. § 3729(a)(1), (2). As a matter of law and logic, a "claim" cannot be deemed "false" or "fraudulent" if the claimant is entitled to the money or property requested. *See* Pet. Br. at 38, 43. The disclosure deficiencies alleged here,

accordingly, are not actionable under the FCA for the simple reason that they did not lead Hughes to request a single penny from the Government to which it was not entitled. *See, e.g., Brunswick Bank & Trust Co. v. United States*, 707 F.2d 1355, 1365 (Fed. Cir. 1983); *cf. United States ex rel. Berge v. Board of Trustees of the Univ. of Alabama*, 1997 WL 21259, at *6-*9 (4th Cir. Jan. 22, 1997). Indeed, it is silly to suggest that the untimely disclosure of accounting practices can result in a "false claim" where, as here, those accounting practices were not only proper but actually *saved* the Government money.

Schumer, however, declares that an accounting disclosure infraction is *always* actionable under the FCA because a government contractor must, as a "condition of contracting," disclose its accounting practices to the Government. *See* Resp. Br. at 45-46 (citing 41 U.S.C. § 422(h)(1)(A)). Accordingly, Schumer suggests that Hughes' alleged noncompliance with its accounting disclosure obligations defeated the company's "eligibility" for a government payment. *Id.* at 10, 39.

That suggestion is nonsense. It is indeed true that a contractor cannot enter into a major government contract without first filing a disclosure statement describing its accounting practices.[14] Hughes complied with that requirement by filing an accurate disclosure statement prior to the award of the subcontracts at issue here. *See* Pet. App. at 25a, 42a. It is also true that a government contractor must amend its disclosure statement whenever it alters its accounting practices during performance of a contract.[15] It is *not* true, however, that a delay in amending an accounting disclosure statement renders a contractor "ineligible" for payment. To the contrary, under

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[14] *See* 41 U.S.C. § 422(h)(1)(A); 48 C.F.R. § 9903.202-1(b). During the relevant time period here, this requirement was set forth at 50 U.S.C. App. § 2168(h)(1) (1982) and 4 C.F.R. § 351.40(b)(1) (1982).

[15] *See* 48 C.F.R. §§ 9903.201-4(a)(a)(2) & 9903.202-3. During the relevant time period here, this requirement was set forth at 4 C.F.R. §§ 331.50(a)(2) and 351.120 (1982).

established law, the failure to amend such a statement affects the Government's payment obligations only insofar as the improperly disclosed accounting practice itself inflates the Government's costs.[16] Accordingly, where (as here) the underlying accounting practices are entirely proper, any delay in amending an accounting disclosure statement does not affect a contractor's entitlement to payment. That is precisely why the Government's Contracting Officer in this case released the previously withheld $15.4 million in payments with full knowledge of the alleged disclosure noncompliance. *See* J.A. at 136-37; Pet. App. at 67a-68a.[17]

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[16] *See* 41 U.S.C. §§ 422(h)(1)(B) & (h)(3); 48 C.F.R. §§ 30.602-2(d) & 9903.201-4(a)(a)(5); *cf.* 48 C.F.R. § 9903.303(a). During the relevant time period here, these provisions were set forth at 50 U.S.C. App. § 2168(h)(1) (1982) and 4 C.F.R. §§ 331.71(b), 331.50(a)(5), and 351.100 (1982).

[17] Both Schumer and the United States attempt to downplay the implications of the Contracting Officer's decision to pay Hughes in full under the contract. *See* Resp. Br. at 45-46 n.29; U.S. Br. at 30. The Officer's decision is not conclusive on the "allowability" of Hughes' costs, they assert, because (1) it lacks the formal characteristics of a "decision" under the Contract Disputes Act ("CDA"), 41 U.S.C. § 601 *et seq.*, (2) Schumer has alleged "fraud," and (3) the Officer expressly reserved the Government's right to share in any *qui tam* recovery. They are wrong on all counts. *First,* the Officer's decision in the contractor's favor binds the Government regardless of whether it complies with all of the CDA's formalities. *See* J. Cibinic & R. Nash, *Administration of Government Contracts* 1298 (3d ed. 1995). *Second,* the Officer's decision here was made with full knowledge of the underlying allegations of wrongdoing; there is no allegation of fraud *on the Officer* to vitiate that decision. *See, e.g., Chrysler Corp.*, ASBCA No. 17,259, 75-1 BCA (CCH) ¶ 11,236, at 53,491 (Apr. 30, 1975). *Third,* the Officer's boilerplate reservation of the Government's FCA rights did not alter the legal significance of his decision to pay under the contract; that decision necessarily implied a determination that all costs were "allowable." *See, e.g.,* J. Cibinic & R. Nash, *Cost-Reimbursement Contracting* 1105 (2d ed. 1993). In any event, Hughes' petition for *certiorari* was based on the factual premise that the wrongdoing alleged by Schumer did not result in any "unallowable" costs but actually *saved* the Government money. *See* Pet. Cert. at 20-22 & n.7. Schumer's brief in opposition did not contest that premise, but instead argued that cost

(continued...)

Schumer is thus ultimately reduced to arguing that an alleged disclosure violation is actionable under the FCA *regardless* of whether, in any particular case, it results in an inflated request for payment. *See* Resp. Br. at 47. This is so, Schumer asserts, because accounting disclosure requirements "serv[e] to protect the Government's fiscal interests *in the long run.*" *Id.* (emphasis added). Under that remarkable theory, *any* infraction by a government contractor (no matter how technical) is apparently actionable under the FCA if it can be said to affect the public fisc in some general sense.[18] Such an open-ended standard of liability would not only lead the FCA to swallow up a large chunk of contract law and the U.S. Code, *see* Pet. Br. at 40-41, but would itself injure the public fisc by making it harder (and more expensive) for the Government to find contractors willing to do business. *Cf. United States v. Winstar Corp.*, 116 S. Ct. 2432, 2459 (1996).[19]

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[17](...continued)
impact was simply irrelevant to FCA liability. *See* Opp. Cert. at 9-12. Accordingly, it is too late now for Schumer to challenge the underlying premise. *See, e.g., Lockhart v. Fretwell,* 506 U.S. 364, 371 n.4 (1993); *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 466 n.10 (1992).

[18] The United States advances the related argument that *any* breach of contract—regardless of whether it involves injury to the public fisc—falls within the FCA's scope if it has any "bearing upon" a government contractor's entitlement to payment. *See* U.S. Br. at 25-28. Whatever the merits of that sweeping argument, *but see United States ex rel. Windsor v. Dyncorp, Inc.*, 895 F. Supp. 844, 848-51 (E.D. Va. 1995), it is beside the point. As explained in text, the disclosure infractions alleged here did *not* affect Hughes' entitlement to payment.

[19] Because he cannot defend the Ninth Circuit's holding that potential cost impact is irrelevant to FCA liability, Schumer attempts to pass it off as a non-dispositive "alternative holding." Resp. Br. at 39. He cannot, however, dodge the issue. To be sure, the Ninth Circuit also stated that Hughes' alleged disclosure deficiencies "may" have rendered unspecified costs "unallowable" within the meaning of a federal regulation. *See id.* (quoting Pet. App. at 25a). That statement is not only incorrect, *see supra* at 18 n.17, Pet. Br. at 43-44 n.26, but also irrelevant. The Ninth Circuit

(continued...)

B. Finally, Schumer defends the Ninth Circuit's decision to address his allegation of improper disclosure to the Government notwithstanding his failure to raise that allegation in his complaint. *See* Resp. Br. at 47-49. Because he cannot defend the Ninth Circuit's reasoning, however, he simply distorts it.

1. Schumer's principal argument is that the Ninth Circuit erred as a *factual* matter by stating that he "did not allege these claims in his complaint." Pet. App. at 22a. That argument is not only baseless, but comes too late in the day to shield the Ninth Circuit's rule of mandatory *de facto* amendment from this Court's review. Schumer's brief in opposition to *certiorari* did not challenge the factual premise underlying the Ninth Circuit's application of its rule in this case. Accordingly, this Court should review the holding below "under the same factual assumptions" as the lower court. *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1020 n.9 (1992).

2. As a fallback argument, Schumer asserts that the Ninth Circuit did not apply its established (but indefensible) rule of mandatory *de facto* amendment, but instead held only that the district court here had *discretion* (which it presumably abused) to address the allegations first raised in Schumer's brief in opposition to summary judgment. *See* Resp. Br. at 49 & n.32. That assertion is simply untrue. *See* Pet. App. at 22a-23a.

CONCLUSION

The judgment below should be reversed.

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[19](...continued)
authorized the imposition of liability under the FCA *regardless* of whether an alleged infraction had any impact on costs, "unallowable" or otherwise. *See* Pet. App. at 25a. Under that approach, the existence of "unallowable" costs might determine the availability of *damages*, but not the existence of *liability*. Indeed, Schumer himself adopts precisely this position. *See* Resp. Br. at 47 n.30.

Respectfully submitted,

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No. 95-1340

In the Supreme Court of the United States

OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY, PETITIONER

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

The False Claims Act prohibits a variety of fraudulent or deceptive practices involving government funds and property. 31 U.S.C. 3729 *et seq.* The Act authorizes individual citizens (known as "relators") to bring private suits, commonly referred to as *qui tam* actions, to enforce the Act for the benefit of the United States. 31 U.S.C. 3730(b)(1). A 1986 amendment to the Act provides that "[n]o court shall have jurisdiction over [a *qui tam*] action * * * based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." 31 U.S.C. 3730(e)(4)(A) (footnote omitted). This Court granted the petition for a writ of certiorari limited to the following questions:

1. Whether the courts below erred in asserting jurisdiction over this action under the *qui tam* provisions of the False Claims Act.

2. Whether injury to the public fisc is an essential element of a cause of action under the False Claims Act.

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In the Supreme Court of the United States

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HUGHES AIRCRAFT COMPANY, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.*, establishes civil penalties for a variety of forms of fraud against the United States. The FCA authorizes both the Attorney General and (under certain circumstances) private parties to file civil actions to enforce the Act. The United States has a substantial interest in the correct interpretation of statutory provisions governing suits brought to redress fraud against the government. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

STATUTORY PROVISION INVOLVED

Section 3730 of Title 31, United States Code, is reprinted as an appendix to this brief.

STATEMENT

1. The FCA prohibits any person from "knowingly" presenting "a false or fraudulent claim for payment or approval" to the federal government. 31 U.S.C. 3729(a)(1). The Act also prohibits a variety of related deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(2)-(7). Any person who violates the FCA "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains," for each violation of the Act. 31 U.S.C. 3729(a).

The Attorney General may bring a civil action if she finds that a person has committed a violation. 31 U.S.C. 3730(a). The Act also authorizes individual citizens (known as relators) to bring private suits, commonly referred to as *qui tam* actions. 31 U.S.C. 3730(b)(1). The Act provides that a *qui tam* action is brought "for the person [the relator] and for the United States Government." *Ibid.* When a *qui tam* action is filed, the government may intervene to take over the litigation "within 60 days after it receives both the complaint and the material evidence and information," 31 U.S.C. 3730(b)(2), or "at a later date upon a showing of good cause," 31 U.S.C. 3730(c)(3). If the government elects not to intervene, the relator "shall have the right to conduct the action." *Ibid.*

Any monetary recovery in a *qui tam* action is divided between the government and the relator. In cases in which the government does not intervene and the relator conducts the action, the relator receives between 25% and 30% of the proceeds of the action or settlement, while the United States receives the rest. 31 U.S.C. 3730(d)(2). If the government intervenes

and prosecutes the action, the relator generally receives between 15% and 25% of the proceeds. 31 U.S.C. 3730(d)(1).[1]

In *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 545-548 (1943), this Court held that a *qui tam* suit under the FCA could go forward even if the allegations in the complaint were derived entirely from a criminal indictment filed by the government in a related case. Congress amended the Act shortly thereafter to preclude such "parasitical" actions.[2]

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[1] The Act provides, however, that "[w]here the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation." 31 U.S.C. 3730(d)(1) (footnote omitted).

[2] The terms "parasitical" and "parasitic" are typically used in this context to refer to *qui tam* suits whose allegations are actually derived from publicly available materials. See, *e.g.*, Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 Pub. Cont. L. J. 237, 241 (1995) ("In the late 1930s, enterprising relators revived the [FCA] by bringing 'parasitic' lawsuits—lawsuits copied from preexisting indictments or based upon congressional investigations."). That appears to be the sense in which Hughes uses the terms. See Pet. Br. 2 (referring to "'parasitic' actions by relators who simply leech onto allegations of wrongdoing *already disclosed* by the Government or the news media"), 27 (referring to "'parasitic' *qui tam* actions based on information copied from a criminal indictment").

See Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 609; *United States ex rel. Wisconsin* v. *Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984) ("Congress's immediate concern in enacting the 1943 amendment was to do away with the 'parasitical suits' allowed by *Hess*."). From 1943 to 1982, the FCA provided that "[t]he court shall have no jurisdiction to proceed with any [*qui tam*] suit * * * whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." 31 U.S.C. 232(C) (1976). The substance of that jurisdictional bar was carried forward when the Act was recodified in 1982. See Act of Sept. 13, 1982, Pub. L. No. 97-258, § 1, 96 Stat. 979. Thus, as of 1982, the Act provided that "the court shall dismiss [a *qui tam*] action * * * on discovering the action is based on evidence or information the Government had when the action was brought." 31 U.S.C. 3730(b)(4) (1982).[3]

The courts consistently construed those versions of the jurisdictional bar to preclude *qui tam* actions even where the government had made no effort to investigate allegations of fraud, see S. Rep. No. 345, 99th Cong., 2d Sess. 12 (1986), and even where the relevant information had been brought to the government's attention by the relator himself, see *id.* at 12-13 (citing *Wisconsin*, *supra*). To address those

[3] Pub. L. No. 97-258 was intended "[t]o revise, codify, and enact *without substantive change* certain general and permanent laws, related to money and finance." 96 Stat. 877 (emphasis added). The House Report accompanying the 1982 revision and recodification explained that the language of the jurisdictional bar had been reformulated "to eliminate unnecessary words." H.R. Rep. No. 651, 97th Cong., 2d Sess. 145 (1982).

concerns, Congress further amended the jurisdictional bar in 1986. See False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3157. The current version of the bar provides:

> No court shall have jurisdiction over [a *qui tam*] action * * * based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless * * * the person bringing the action is an original source of the information.

31 U.S.C. 3730(e)(4)(A) (footnote omitted).[4]

2. This case involves a *qui tam* action filed in January 1989 by respondent William J. Schumer, then an employee of petitioner Hughes Aircraft Company. Schumer alleged that Hughes had developed and built radar components for use in its government contracts for both the B-2 bomber and the F-15 fighter plane that should have been charged entirely to the F-15 contract. Schumer contended that Hughes had violated the FCA by creating an internal "commonality agreement" that allowed the company to charge the costs of those radar components in part to the B-2 contract. See Pet. App. 3a-4a. After investigating Schumer's allegations, the Department of Justice declined to intervene to take over the litigation. *Id.* at

[4] The Act defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. 3730(e)(4)(B).

4a. Schumer then pursued the action without participation by the government.

3. Hughes moved to dismiss the suit on several grounds unrelated to the merits of Schumer's allegations. First, Hughes noted that the FCA violations were alleged to have occurred before the 1986 amendments to the Act; it argued that the suit should be governed by the law in effect at the time of the alleged violations, and that Schumer would have been barred from pursuing this matter under the jurisdictional bar found in the Act at that time. Second, Hughes contended that Schumer's suit was "based upon" a "public disclosure" of "allegations or transactions in a[n] * * * administrative * * * audit" and was therefore foreclosed even under the jurisdictional bar as amended in 1986. 31 U.S.C. 3730(e)(4)(A); J.A. 176. Finally, Hughes argued that the *qui tam* provisions of the FCA are unconstitutional. The district court summarily denied the motions to dismiss. Pet. App. 34a-35a; J.A. 196.

4. Hughes then moved for summary judgment on the merits. The district court granted that motion. See Pet. App. 36a-64a. The court found that Hughes had properly informed the government and other contractors of its use of the commonality agreements, and that no genuine issue of material fact existed as to whether Hughes had submitted a false claim. *Id.* at 4a, 64a.

5. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-31a.

a. The court first concluded that the case is governed by the current version of the FCA's jurisdictional bar provision, 31 U.S.C. 3730(e)(4), rather than by the version in effect at the time of the alleged violations. Under this Court's decision in *Landgraf*

v. *USI Film Prods.*, 511 U.S. 244, 274 (1994), the court of appeals stated, there is "a strong presumption that jurisdictional statutes apply retrospectively." Pet. App. 6a. The court found nothing in the text or history of Section 3730(e)(4) to rebut that presumption. Pet. App. 7a. The court noted in particular that the 1986 amendments to the jurisdictional bar "did not alter [the defendant's] underlying liability; [they] only altered the conditions under which a qui tam relator can bring an action to enforce that liability." *Ibid.* (quoting *United States ex rel. Lindenthal* v. *General Dynamics Corp.*, 61 F.2d 1402, 1408 (9th Cir. 1995), cert. denied, 116 S. Ct. 1319 (1996)).

b. The court of appeals next held that Schumer's suit was not precluded by the current version of the FCA's jurisdictional bar because there had been no "public disclosure" within the meaning of Section 3730(e)(4)(A). The court rejected Hughes' contention that "the dissemination of government audits to employees of [Hughes and the prime contractor] who were not involved in the alleged fraud constituted public disclosure." Pet. App. 8a. The court explained that, "in the context of defense procurement, security considerations generally require that the government, contractors, and subcontractors operate within a closed loop of secrecy. * * * Under a practical, commonsense interpretation of the jurisdictional provisions, information that was disclosed in private has not been publicly disclosed." *Id.* at 9a-10a (internal quotation marks omitted). The court held on that basis that "disclosure to company employees does not constitute public disclosure." *Id.* at 11a. The court of appeals also rejected Hughes' contention that the audits in question constituted "public disclosures" because they were potentially available to the public

under the Freedom of Information Act (FOIA), 5 U.S.C. 552. See Pet. App. 11a-13a.[5]

c. Hughes also challenged the constitutionality of the FCA's *qui tam* provisions. Hughes contended that *qui tam* relators fail to satisfy Article III standing requirements; that the *qui tam* provisions violate separation of powers principles; and that the provisions violate limitations under the Appointments Clause, Art. II, § 2, Cl. 2, on who may conduct litigation on behalf of the United States. The court of appeals rejected those arguments on the basis of its prior decisions in *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 747-759 (9th Cir. 1993), cert. denied, 510 U.S. 1140 (1994), and *United States ex rel. Madden* v. *General Dynamics Corp.*, 4 F.3d 827, 830 (9th Cir. 1993). See Pet. App. 14a.

d. The court then considered Schumer's appeal from the district court's decision granting summary judgment to Hughes on the merits. Schumer challenged, *inter alia*, the adequacy of Hughes' disclosure to its prime contractor, the Northrop Corporation, of its method of allocating the radar costs to the B-2 contract. See Pet. App. 19a. Schumer contended that Hughes' failure to provide adequate disclosure "caused Northrop to be misled as to the costs to the B-2 program, thus creating a substantial issue as to the reasonableness of allowing the * * * charges." *Ibid.* The court of appeals concluded that genuine issues of material fact existed regarding that question. *Id.* at 19a-22a. The court also found genuine issues of material fact with respect to Schumer's claim that Hughes had failed to comply with the cost accounting statements (CAS) that it was required to submit to the government. See *id.* at 22a-26a. The court asserted in that regard that Hughes' apparent "noncompliance with the CAS may have rendered the costs unallowable." *Id.* at 25a.

[5] Because the court concluded that there had been no "public disclosure" of the audits in question, it did not address the question whether respondent's suit was "based upon" those audits, or whether respondent was an "original source" of the allegations. Pet. App. 14a; see page 5 and note 4, *supra*.

6. On October 15, 1996, this Court issued an order granting the petition for a writ of certiorari "limited to Questions 1 and 2 presented by the petition." 117 S. Ct. 293. Those questions are as follows:

> 1. Whether the courts below erred in asserting jurisdiction over this action under the *qui tam* provisions of the False Claims Act.
>
> 2. Whether injury to the public fisc is an essential element of a cause of action under the False Claims Act.

Pet. i.

SUMMARY OF ARGUMENT

1. The court of appeals correctly held that the instant suit is governed by the current "public disclosure" provision rather than by its predecessor provision, which mandated dismissal of all *qui tam* suits based on evidence or information in the government's possession. While recognizing that "the presumption against retroactive legislation is deeply rooted in our jurisprudence," *Landgraf* v. *USI Film Prods.*, 511 U.S. at 265, this Court has made clear that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment," *id.* at 269. The Court has noted, in particular, that statutes

governing the jurisdiction of federal courts are routinely applied to cases arising out of pre-statute conduct. The Court has recognized, more generally, that statutes governing the manner in which litigation is conducted rather than the primary conduct of regulated parties may be *prospectively* applied to future litigation arising out of pre-statute activities.

Both current Section 3730(e)(4) and its predecessor version "speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf*, 511 U.S. at 274. Replacement of former Section 3730(b)(4) with the current "public disclosure" provision neither prohibited previously lawful conduct nor increased the penalties for violations. Whether or not Section 3730(e)(4) is properly characterized as a "jurisdictional" rule, it addresses the conduct of *qui tam* litigation rather than the primary conduct of persons who submit claims to the government. Application of Section 3730(e)(4) (rather than its predecessor version) to the instant suit is therefore an appropriate *prospective* application of that statutory amendment.

2. The "public disclosure" bar is not applicable to this case. Although disclosure to a defendant contractor's employees can sometimes constitute a "public disclosure," no "public disclosure" occurred here. In our view, a public disclosure occurs whenever allegations or transactions are revealed to any person outside the government other than the suspected wrongdoer, so long as that person is under no duty not to reveal the information to others. Under the circumstances of this case, where the record as it comes to this Court reveals no dissemination of the audit reports beyond those employees specifically designated by Hughes to review them on the company's behalf, the disclosures in question are properly regarded as having been made not to the individual employees *qua* individuals, but to the company itself. Because the disclosures have not been shown to extend beyond the suspected wrongdoer (the company), the limited dissemination of the audit reports was insufficient to place them in the public domain.

3. The text and history of the FCA make clear that a showing of pecuniary injury to the United States is not a requisite element of a cause of action for civil penalties. Indeed, Hughes has essentially abandoned the contention that proof of injury to the public fisc is required. Hughes now argues, however, that a claim is "false or fraudulent" within the meaning of the Act only if it involves "the submission of an inflated request for payment." Pet. Br. 39. That argument reflects an unduly narrow conception of the FCA's proscriptions.

In our view, a claim is "false or fraudulent" within the meaning of the Act whenever it misstates facts bearing on the claimant's entitlement to payment, regardless of whether the misstatement relates to the quality of the goods or services provided or the appropriateness of the price charged. For example, statutory and regulatory provisions regarding the government's acquisition of goods and services frequently establish eligibility criteria (*e.g.*, a requirement that American-made components be used) that are designed to serve purposes other than simply to ensure the quality and price of the goods or services obtained. A claimant's misrepresentation of compliance with such criteria is sufficient to render the claim "false or fraudulent," even if the claimant accurately describes the goods or services provided, and even if those goods or services are of the sort for

which payment is generally authorized. The FCA thus reaches claims that undermine a federal program by diverting its benefits to persons other than the intended recipients, even where the injury to the government is not naturally characterized as "pecuniary" in nature.

4. The government takes no position regarding the merits of Schumer's FCA claims. We note, however, our disagreement with three aspects of Hughes' argument. First, we do not read the court of appeals' opinion to suggest that every statutory or regulatory violation committed by a government contractor will give rise to liability under the FCA. Second, we disagree with the suggestion that a failure to provide accurate information regarding accounting methods would constitute a mere "technical" violation. Finally, we do not agree that the government's payment of the claims in question precludes any subsequent challenge to the allowability of the costs.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE CURRENT VERSION OF THE FCA'S JURISDICTIONAL BAR, 31 U.S.C. 3730(e)(4), APPLIES TO THE INSTANT SUIT

At the time of the FCA violations alleged in this case, the Act provided that "the court shall dismiss [a *qui tam*] action * * * on discovering the action is based on evidence or information the Government had when the action was brought." 31 U.S.C. 3730(b)(4) (1982); see page 4, *supra*. Effective October 27, 1986, the Act was amended to provide that "[n]o court shall have jurisdiction over [a *qui tam*] action * * * based upon the public disclosure of allegations or transactions in" specified fora. 31 U.S.C. 3730(e)(4)(A); see

False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153. Hughes contends (Pet. Br. 14-22) that the court of appeals erred in adjudicating Schumer's suit under the current version of the FCA's jurisdictional bar, rather than under the version in effect at the time of the alleged wrongdoing. We disagree.

A. In *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994), this Court recognized that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." The Court also observed, however, that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *Id.* at 269. The Court noted, for example, that it had "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274. The Court explained that "[p]resent law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Ibid.*; see also *id.* at 292 (Scalia, J., concurring in the judgments) (noting the Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction").

Both current Section 3730(e)(4) and its predecessor "speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf*, 511 U.S. at 274 (internal quotation marks omitted); see Pet. App. 6a-7a. Replacement of former Section 3730(b)(4) with the current "public disclosure" provision neither prohibited previously lawful conduct nor

increased the penalties for violations. The statutory amendment therefore did not alter either the existence or the extent of Hughes' liability to the government; it simply expanded the circumstances under which *qui tam* relators may pursue actions to enforce that liability. See Pet. App. 7a.[6] Application of the current Section 3730(e)(4) to the instant suit is thus consistent with this Court's decision in *Landgraf*.

B. Although we believe that Section 3730(e)(4) is properly characterized as a "jurisdictional" rule,[7] the

[6] We therefore disagree with Hughes' assertion that the 1986 version of the jurisdictional bar "self-evidently expands an FCA defendant's liability." Pet. Br. 16. As the Ninth Circuit observed in an earlier case, "[p]roof that the government had the information when suit was brought was not an 'absolute defense' under the preamendment FCA. Rather, it was simply a jurisdictional defense to an action brought by a qui tam relator, as opposed to an action brought directly by the government." *United States ex rel. Lindenthal* v. *General Dynamics Corp.*, 61 F.3d 1402, 1408 (9th Cir. 1995), cert. denied, 116 S. Ct. 1319 (1996). Nor do we see merit in Hughes' reliance (Pet. Br. 17) on cases holding that particular statutory amendments creating private rights of action would not be applied to suits involving alleged pre-amendment misconduct. None of the cited cases suggests that the remedies sought by the private plaintiffs had previously been available in enforcement actions brought by the government.

[7] Section 3730(e)(4)(A) is phrased as a jurisdictional limitation, providing that "[n]o court shall have jurisdiction over" a *qui tam* action based upon defined categories of public disclosures. 31 U.S.C. 3730(e)(4)(A). From 1943 to 1982, the Act provided that "[t]he court shall have no jurisdiction to proceed with" a *qui tam* suit "based upon evidence or information in the possession of the United States." 31 U.S.C. 232(C) (1976). Although the 1982 revision and recodification of Title 31 eliminated the word "jurisdiction" from that provision, the text and history of the 1982 revision make clear that no substantive change was intended. See note 3, *supra*.

propriety of applying Section 3730(e)(4) to the instant case does not depend on that characterization. The principle that new jurisdictional statutes apply to cases involving pre-statute conduct is not an exception to the presumption against retroactive application of statutory changes. Rather, the Court's approach to jurisdictional statutes reflects a more general recognition that a statute governing the conduct of litigation rather than the primary conduct of regulated parties may be *prospectively* applied to future litigation arising out of pre-statute activities. Cf. *Landgraf*, 511 U.S. at 275 ("Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive."); *id.* at 293 (Scalia, J., concurring in the judgments) ("[T]he purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised.").[8] Whether or not Section

In the district court, Hughes relied on Section 3730(e)(4) in moving to dismiss Schumer's suit "for lack of subject matter jurisdiction." J.A. 176; see Pet. 4. Indeed, the petition for a writ of certiorari sought review of the question "[w]hether the courts below erred in asserting jurisdiction over this action under the *qui tam* provisions of the False Claims Act." Pet. i. The petition repeatedly characterized Section 3730(e)(4) as a "jurisdictional bar." See Pet. 2, 5, 8, 9, 10, 11. In its brief on the merits, by contrast, Hughes has reformulated the question presented (see Pet. Br. i) and now contends that "it is far from clear whether the word 'jurisdiction' in § 3730 defines a court's subject-matter jurisdiction at all." Pet. Br. 21.

[8] We therefore disagree with the court of appeals' assertion that the Court in *Landgraf* "carved out an exception to [the

3730(e)(4) is properly characterized as a "jurisdictional" rule, it addresses the conduct of *qui tam* litigation rather than the primary conduct of persons who submit claims to the government. Application of Section 3730(e)(4) to the instant suit therefore does not constitute retroactive application of that statutory amendment.

C. As Hughes observes (Pet. Br. 15), legislation may be said to operate retroactively where it "attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. At bottom, Hughes' argument is that Section 3730(e)(4) "attaches new legal consequences" to prior events because it increases the practical likelihood that Hughes' prior conduct will become the subject of FCA litigation that culminates in a judgment against the company. The same might be said, however, of a statute that authorized the hiring of additional government investigators or attorneys or the creation of an Independent Counsel, or one that transferred enforcement responsibility to a different (and perhaps more aggressive) federal agency. Because the replacement of former Section 3730(b)(4) with current Section 3730(e)(4) neither prohibited previously lawful conduct nor increased the penalties for violations, application of the amended provision to Schumer's suit does not constitute retroactive application of the new law. Cf. *California Dep't of Corrections* v. *Morales*, 115 S. Ct. 1597, 1601 (1995) (a criminal statute violates the Ex Post Facto Clause only if it "retroactively alter[s] the definition of crimes or increase[s] the punishment for criminal acts") (quoting

presumption of nonretroactivity] in the case of jurisdictional statutes." Pet. App. 6a.

Collins v. *Youngblood*, 497 U.S. 37, 41 (1990)); *Landgraf*, 511 U.S. at 269 n.23, 275 n.28 (invoking Ex Post Facto precedents in delineating civil retroactivity rules).[9]

II. THE COURT OF APPEALS CORRECTLY HELD THAT SCHUMER'S SUIT WAS NOT SUBJECT TO DISMISSAL UNDER THE AMENDED JURISDICTIONAL BAR

Hughes next contends (Pet. Br. 23-37) that Schumer's suit is barred even under current Section 3730(e)(4) because the disclosure of the government audits to Hughes' own employees constituted a "public disclosure."[10] Again, we disagree.

Under Section 3730(e)(4), unless the relator is an "original source" of the information on which the suit is based (see note 4, *supra*), federal courts lack jurisdiction of *qui tam* actions "based upon the public disclosure of allegations or transactions" in specified fora. Thus, a *qui tam* suit may proceed under Section 3730(e)(4) if, but only if, one of the following three conditions is met: (1) there has been no prior "public disclosure" of the allegations or transactions upon which the suit is based; (2) although there has been a

[9] It does not follow, however, that *all* provisions of the 1986 FCA amendments apply to cases filed after enactment that challenge pre-enactment conduct. Rather, a court "should evaluate each provision of the [amendments] in light of ordinary judicial principles concerning the application of new rules to pending cases and preenactment conduct." *Landgraf*, 511 U.S. at 280.

[10] Hughes has abandoned the contention made in its petition for a writ of certiorari (see Pet. 16-18) that the potential availability of the government audits pursuant to the Freedom of Information Act (FOIA) constituted a "public disclosure."

"public disclosure," the suit is not "based upon" such disclosure; or (3) the relator qualifies as an "original source." In this case, at least insofar as the facts have been developed to this point, we believe there has been no "public disclosure" within the meaning of the statute. Thus, it is unnecessary to determine either (1) whether or not Schumer's suit is "based upon" the allegations or transactions addressed in the audit reports or (2) whether Schumer would constitute an "original source."[11]

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[11] With respect to the "based upon" inquiry, a circuit conflict exists regarding the proper application of Section 3730(e)(4)(A) to situations in which the allegations of a *qui tam* complaint, though substantially similar to allegations that had previously been publicly disclosed, were derived independently (in whole or in part) from the public materials. At least three courts of appeals have concluded that Section 3730(e)(4)(A) applies whenever the allegations or transactions described in the relator's complaint have previously been the subject of a public disclosure, whether or not the relator actually derived his complaint from materials in the public domain. See *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992) ("Public disclosure of the allegations divests district courts of jurisdiction over *qui tam* suits, regardless of where the relator obtained his information."); *Wang* v. *FMC Corp.*, 975 F.2d 1412, 1417-1419 (9th Cir. 1992); *United States ex rel. Cooper* v. *Blue Cross Blue Shield of Fla.*, 19 F.3d 562, 567 (11th Cir. 1994). The Fourth Circuit has taken the contrary view, holding that "a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based." *United States ex rel. Siller* v. *Becton Dickinson & Co.*, 21 F.3d 1339, 1348, cert. denied, 115 S. Ct. 316 (1994). While the view of the Tenth Circuit is not entirely clear, it appears to agree with the majority. In *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548 (10th Cir. 1992), cert. denied, 507 U.S. 951 (1993), after stating that "an FCA *qui tam* action even partly based upon publicly disclosed

With respect to the general principles governing the interpretation of the phrase "public disclosure" in Section 3730(e)(4), the government is in substantial accord with Hughes' analysis. We agree (see Pet. Br. 33) that the disclosure need not be widespread or extend to the *general* public. Like Hughes (see *id.* at 25-26), moreover, we disagree with the court of appeals' apparent conclusion (see Pet. App. 8a-11a) that disclosure to a defendant contractor's employees cannot, under any circumstances, constitute a "public" disclosure. In our view, a public disclosure occurs whenever allegations or transactions are revealed to any person outside the government other than the suspected wrongdoer, so long as that person is under no duty not to reveal the information to others.[12] That legal standard appears substantially, if

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allegations or transactions" is jurisdictionally barred, 971 F.2d at 552, the court then dismissed the complaint merely upon a showing that a "substantial identity" existed between material that had been publicly disclosed and the material in the complaint, *id.* at 553.

The court below declined to address this issue in light of its conclusion that no "public disclosure" had occurred in this case. Pet. App. 14a. Because we agree that the record does not reveal a "public disclosure," we believe this case would be an inappropriate vehicle for resolution of the circuit conflict described above. Hughes apparently agrees. See Pet. Br. 24 n.9.

[12] In the circumstances specified in the statute—particularly where there has been a public disclosure through specified types of government reports and actions—it is likely that the government is already investigating the matter, or appropriate government investigatory personnel have sufficient information to trigger an investigation. Unless the relator is an "original source," *qui tam* lawsuits brought in these circumstances—after a public disclosure has occurred showing that the government is itself taking action or is capable of taking action—

not entirely, consistent with the test Hughes advocates. See Pet. Br. 25-26.[13]

Our disagreement with Hughes concerns the proper application of the governing principles to the instant case. Because the issue of Section 3730(e)(4)'s application to this case arises in the context of a motion to dismiss, any ambiguities in the record before the Court must be resolved in favor of Schumer, the non-moving party. See, *e.g.*, *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 889 (1990); *McLain* v. *Real Estate Bd. of New Orleans*, 444 U.S. 232, 246 (1980); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). As far as we can determine, the audit reports at issue in this case were sent from the government to Hughes as the suspected corporate wrongdoer; individual employees received the audits only insofar as they were designated by Hughes management to receive and analyze them on behalf of the company. Those employees presumably received the documents

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are likely to bring the Treasury nothing more than what government prosecutors would have recovered on their own initiative, and they divert a portion of that recovery unnecessarily from the Treasury to private hands.

[13] Under the standard described in the text, the question whether information revealed to a corporate defendant's employees is the subject of a "public disclosure" cannot appropriately be resolved on the basis of a per se rule. An agency record released to an employee of a corporate defendant in response to a FOIA request, for example, would surely constitute a "public disclosure." The employee would receive the record in his capacity as a member of the public, and his status as a corporate employee would place no restrictions on his entitlement to disseminate the material to a wider audience. By contrast, no "public disclosure" would occur if the government revealed information to a corporate employee upon the express condition that he would not convey it to others.

upon the understanding that they would use the information contained therein only in furtherance of Hughes' business. Under those circumstances, the disclosures are properly regarded as having been made not to the individual employees *qua* individuals, but to the company itself. Because the disclosures in question have not been shown to extend beyond the suspected wrongdoer (the company), the limited dissemination of the audit reports was insufficient to place them in the public domain. Compare *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 319-320, 323 (1992) ("public disclosure" occurred where government investigators communicated allegations to contractor employees who were found on the premises during raid of defendant's business, and who were "under no obligation to keep th[e] information confidential").[14]

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[14] Hughes asserts (Pet. Br. 35-36) that the audits at issue in this case were disclosed to employees of the prime contractor (Northrop) as well as to petitioner's own employees. The record material cited by Hughes (see Pet. Br. 36 (citing J.A. 30)) does not support that contention. As far as we can determine from the record, the only audit report disclosed to the prime contractor was the classified Air Force Audit 86-5, which was not declassified until September 5, 1990, 19 months after this *qui tam* suit was filed. See Exhibit 1 to Affidavit of John F. Wilson, filed as Exhibit 62 to Hughes' Exhibits in Support of Motion for Summary Judgment, filed 1/27/92 (showing declassification stamp). Because that audit report was classified at the time the *qui tam* suit was filed, its disclosure to Northrop could not have qualified as a "public disclosure." The Northrop custodian of records was able to identify no other relevant government audit reports in Northrop's possession. See Declaration of Laurie L. Bilbruck and Attachments, dated 10/12/90, filed as Attachment D to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed 10/15/90. To the extent that the record is ambiguous regarding the nature or extent of

Hughes' principal contention is that all disclosures to a contractor's employees should be treated as "public" disclosures in order to ensure that "parasitic" *qui tam* actions are precluded by Section 3730(e)(4). Hughes contends that "if the Ninth Circuit's rule is upheld, every government audit or investigation can be expected to spin off its own 'parasitic' *qui tam* action." Pet. Br. 37. Although we agree that as a general matter "the employees of government contractors are * * * the 'paradigm' relators" (*id.* at 35), we see no reason to believe that the narrow group of employees designated *by the contractor itself* to receive and evaluate government audits will be a frequent source of *qui tam* litigation. We therefore believe that Hughes substantially overstates the danger that "parasitic" *qui tam* suits will proliferate if the instant suit is allowed to go forward. Under the functional test we urge, moreover, contractors like Hughes have it within their own control to calibrate the risk of *qui tam* suits based upon audit reports provided to the company by expanding or shrinking the number of corporate representatives to whom the reports are provided.

Moreover, the FCA provides an additional protection against "parasitic" *qui tam* actions even in cases where Section 3730(e)(4) does not bar litigation. Where the government intervenes to take over a *qui tam* suit, the relator is generally entitled to between 15% and 25% of any monetary recovery. 31 U.S.C. 3730(d)(1). The relator in such cases may recover no more than 10% of the proceeds, however, if the action

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any disclosures to Northrop, the ambiguities must be resolved in Schumer's favor in the current posture of the litigation. See page 20, *supra*.

is "based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." *Ibid.* (footnote omitted). That provision does not require that the "disclosures" in question be "public." Thus, even where the jurisdictional bar is inapplicable, the Act provides for a suitable reduction (to zero, if appropriate) of the relator's share of any recovery if the *qui tam* suit is "parasitic" in nature and makes no substantial contribution to the discovery or remediation of fraud.

III. INJURY TO THE PUBLIC FISC IS NOT AN ESSENTIAL ELEMENT OF A CIVIL ACTION BROUGHT UNDER THE FCA

In its petition for a writ of certiorari, Hughes sought review of the question "[w]hether injury to the public fisc is an essential element of a cause of action under the False Claims Act." Pet. i. In its brief on the merits, however, Hughes has reformulated the question presented (see Pet. Br. i), essentially abandoning the contention that recovery of civil penalties under the FCA requires a showing of injury to the public fisc. Hughes continues to argue (see Pet. Br. 37-43), however, that the court of appeals erred in reversing the district court's award of summary judgment.

As we explain below, the court of appeals correctly held that the FCA does not require a showing of injury to the public fisc. Because Hughes' other arguments are not fairly included within the question

presented, this Court should decline to address them. In any event, those arguments lack merit.

A. The FCA provides in pertinent part that

> [a]ny person who —
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval
>
> * * * * *
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person.

31 U.S.C. 3729(a). The text of the statute thus makes clear that a showing of pecuniary injury to the United States is not a requisite element of a cause of action for civil penalties. Rather,

> the statute attaches liability * * * to the 'claim for payment.' Indeed, a contractor who submits a false claim for payment may still be liable under the FCA for statutory penalties, even if it did not actually induce the government to pay out funds or to suffer any loss.

United States v. *Rivera*, 55 F.3d 703, 709 (1st Cir. 1995). The Senate Report accompanying the 1986 FCA amendments confirms that "[t]he United States is entitled to recover [civil penalties] solely upon proof that false claims were made, without proof of any damages." S. Rep. No. 345, 99th Cong., 2d Sess. 8 (1986) (citing *Fleming* v. *United States*, 336 F.2d 475,

480 (10th Cir. 1964), cert. denied, 380 U.S. 907 (1965)). Accord *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 152-153 & n.5 (1956).

B. In its brief on the merits, Hughes now argues not that a showing of actual injury to the public fisc is an essential element of an FCA cause of action, but, instead, that a claim is "false or fraudulent" within the meaning of the Act only if it involves "the submission of an inflated request for payment." Pet. Br. 39. That argument reflects an unduly narrow conception of the FCA's proscriptions.[15]

"In the various contexts in which questions of the proper construction of the [FCA] have been presented, the Court has consistently refused to accept a rigid, restrictive reading." *United States* v. *Neifert-White Co.*, 390 U.S. 228, 232 (1968). Rather, the Court has construed the Act to extend to "all fraudulent attempts to cause the Government to pay out sums of money." *Id.* at 233. In our view, a claim is "false or fraudulent" within the meaning of the Act whenever it misstates facts bearing on the claimant's *entitlement to payment*, regardless of whether the misstatement relates to the character or quality of the goods or services provided or the appropriateness of the price charged.

For example, a false certification of compliance with contractual specifications renders a claim for payment "false or fraudulent" within the meaning of

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[15] The current False Claims Act was enacted into positive law in 1982 as an exclusively civil statute containing its own liability provisions. The fact that a prior incarnation of the statute contained a criminal component does not render the civil FCA criminal or quasi-criminal in nature. Hughes' reliance (see Pet. Br. 41-42) on criminal cases and on the rule of lenity is therefore misplaced.

the Act whether or not the deviation is shown to affect the quality of the product supplied. See, *e.g.*, *United States* v. *Aerodex, Inc.*, 469 F.2d 1003, 1007 (5th Cir. 1972) ("The mere fact that the item supplied under contract is as good as the one contracted for does not relieve defendants of [FCA] liability if it can be shown that they attempted to deceive the government agency."). In addition, statutory and regulatory provisions regarding the government's acquisition of goods and services frequently establish criteria that are designed to serve ancillary social policies, rather than simply to ensure the quality of the goods or services obtained. For example, in *United States* v. *Rule Indus.*, 878 F.2d 535, 536-538 (1st Cir. 1989), the defendant's false certification that the hacksaw blades it manufactured were "domestic end products" within the meaning of the Buy American Act was held to be actionable under the FCA, even though no question was raised as to the quality or price of the blades.[16] A claimant's misrepresentation of compliance with such criteria is sufficient to render the claim "false or

[16] See also, *e.g.*, *United States ex rel. Fallon* v. *Accudyne Corp.*, 880 F. Supp. 636, 638 (W.D. Wis. 1995) (complaint stated FCA cause of action where it alleged that contracts between defendant and the government "expressly required compliance with environmental regulations and that defendant knowingly failed to comply with such regulations and falsely certified that it had so complied in order to induce payments under the contracts"); *Ab-Tech Constr., Inc.* v. *United States*, 31 Fed. Cl. 429, 431, 434 (1994) (FCA was violated by contractor's misrepresentation that it satisfied the eligibility requirements for a program designed to benefit small businesses controlled by "socially and economically disadvantaged individuals," since that misrepresentation "caused the Government to pay out funds in the mistaken belief that it was furthering the aims of the * * * program"), aff'd, 57 F.3d 1084 (Fed. Cir. 1995).

fraudulent," even if no dispute exists as to the quality of the goods or services provided, and even if those goods or services are of the sort for which payment is generally authorized. Thus, while "[v]iolations of laws, rules, or regulations alone do not create a cause of action under the FCA," a claimant's "false certification of compliance [with the law] * * * creates liability when certification is a prerequisite to obtaining a government benefit." *United States ex rel. Hopper* v. *Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) (emphasis omitted). The legislative history accompanying the 1986 FCA amendments reflects Congress's understanding and approval of that principle. See S. Rep. No. 345, *supra*, at 9 ("A false claim for reimbursement under the Medicare, Medicaid or similar program is actionable under the act, * * * and such claims may be false even though the services are provided as claimed if, for example, the claimant is ineligible to participate in the program.").

In *Rex Trailer*, *supra*, this Court applied that principle to the analogous civil penalty provisions of the Surplus Property Act of 1944, 50 U.S.C. App. 1635 (1946). In order to facilitate the re-entry of World War II veterans into civilian life, that Act "gave veterans a priority for the purchase of surplus property, * * * thus afford[ing] veterans an opportunity to purchase goods not available elsewhere at a fair price and on good credit terms." 350 U.S. at 150. The defendant in *Rex Trailer* had obtained five surplus trucks by presenting false certificates of veteran status. *Ibid.* Relying upon its earlier decision in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), a False Claims Act case, the Court held that the assessment of civil penalties was proper. 350 U.S. at 152-154. The Court found it "obvious that injury to the Govern-

ment resulted from the * * * fraudulent purchase," explaining that the violation had "precluded bona fide sales to veterans, decreased the number of motor vehicles available to Government agencies, and tended to promote undesirable speculation." *Id.* at 153.

The decision in *Rex Trailer* reflects the recognition that the harm caused by fraud against the government often is not limited to injury to the public fisc. The economic aspect of the transaction at issue in *Rex Trailer*—the exchange of cash for trucks—was exactly as the government understood it to be. Rather, the defendants' fraudulent efforts to obtain the government's property were objectionable because they caused injury to the federal *program*, by diverting its benefits to persons other than the intended recipients, thereby impairing its efficacy in achieving the statutory purposes. Continued recognition of that principle, and of its application to the FCA, is of central importance in enforcing compliance with conditions imposed by the government upon the receipt of public funds. Thus, while a "claim for payment or approval" is "false or fraudulent" only if it misstates facts bearing upon the claimant's entitlement to receive money or property from the federal government, the claim need not be "inflated" or demand an exorbitant payment for any goods or services rendered.

C. The government takes no position regarding the merits of Schumer's FCA claims or the correctness of the Ninth Circuit's holding that Schumer had raised genuine issues of material fact.[17] We do wish,

[17] At least insofar as *qui tam* actions under the FCA are concerned, we disagree with the court of appeals' suggestion (see Pet. App. 22a-23a) that a new claim raised for the first time at the summary judgment stage may be treated as a de facto amendment to the complaint. The FCA requires that a *qui tam* complaint must be filed under seal and served upon the government, in order that the government may have an adequate opportunity to investigate the allegations and determine whether to intervene and proceed with the action. 31 U.S.C. 3730(b)(2). Those requirements would be subverted by the addition of new claims in unsealed pleadings. In the instant case, however, we believe that the allegation of non-compliance with the Cost Accounting Standards was fairly encompassed within the allegations of the original complaint. See J.A. 73-81.

however, to note our disagreement with three aspects of Hughes' argument.

First, we do not read the court of appeals' opinion to suggest that "the FCA proscribes any and all statutory or regulatory infractions by a government contractor." Pet. Br. 42. Rather, the court determined that material issues of fact remained regarding the allowability of some of the costs for which Hughes submitted claims. See Pet. App. 19a, 25a; Pet. Br. 43 n.26. A misstatement bearing on Hughes' entitlement to payment would render the claim "false or fraudulent." If the court of appeals erred in concluding that the allowability of those costs was open to dispute, its error involved the arcana of government contracting regulations, not the proper interpretation of the FCA.

Second, we disagree with Hughes' suggestion (see, *e.g.*, Pet. Br. 38) that a failure to provide accurate information regarding its accounting methods would constitute a mere "technical" violation. The Department of Defense is directed by statute to require high-dollar-value contractors and subcontractors to "disclose in writing their cost accounting practices." 41 U.S.C. 422(h)(1)(A). That requirement is imposed "as a condition of contracting with the United

States." 41 U.S.C. 422(h)(1). Submission of an accurate disclosure statement is essential so that the government can evaluate the true cost of the proposal and assess the propriety of the contractor's pricing methods.

Finally, we disagree with Hughes' contention (see Pet. Br. 43-44 n.26) that the Administrative Contracting Officer's letter (Pet. App. 67a-68a) and the government's subsequent payment of the claims in question precludes any subsequent challenge to the allowability of the costs. The letter on which Hughes relies addressed only one Cost Accounting Board standard (No. 401); it made no finding concerning allowability; and it does not bear any of the required characteristics of a "decision" by the contracting officer that may be given preclusive effect. See 41 U.S.C. 605(a); 48 C.F.R. 33.211(a)(4)(v). Even if the contracting officer had issued a decision as to allowability, moreover, a showing of fraud or mistake would always provide a basis to reconsider the decision, as is made clear by the authority on which Hughes relies. See John Cibinic, Jr. & Ralph C. Nash, Jr., *Cost-Reimbursement Contracting* 1105 (2d ed. 1993); see also 41 U.S.C. 605(a) (contracting officer may not issue a decision concerning allowability on a matter involving fraud). Indeed, in recommending that the suspended costs be released, the contracting officer noted that "the Government does not waive rights to a share in any settlement resulting from the parallel qui tam action in the event the relator's case is successful," J.A. 137—a reservation of rights obviously inconsistent with any notion that the government's payment of claims would be preclusive of Schumer's suit.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

The False Claims Act, 31 U.S.C. 3730, provides as follows:

§ 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by

affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall

have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to

an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such ex-

penses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional,

administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any

special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

(10)

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No. 95-1340

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Aerospace Industries Association of America, Inc. ("AIA") is a national, non-profit trade association representing manufacturers of commercial, military and business aircraft, helicopters, aircraft engines, missiles, spacecraft, and related components and equipment. AIA is comprised of fifty-one member companies, including many of the nation's largest corporations. Virtually all of AIA's members provide goods and services under contracts with the federal government, many deriving a significant portion of their business from such contracts.

Many of AIA's members who perform government contracts have been affected by the False Claims Act Amendments of 1986 ("1986 Amendments"), Pub. L. No. 99-562, 100 Stat. 3153, 31 U.S.C. §§ 3729, *et seq.* The 1986 Amendments stimulated a substantial increase in the number of *qui tam* actions brought by individuals (or "relators") empowered to bring actions in the name of the government against government contractors who are alleged to have submitted false claims to the government. Since 1986, AIA members have been named in over sixty such actions, including more than thirty *qui tam* actions.

Both petitioner and respondent have consented to the filing of this brief. Letters reflecting such consents have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

This is a case in which petitioner Hughes Aircraft Company ("Hughes") used a contract cost-allocation method that saved the government money; the government conducted its own investigation in coming to that conclusion; and the government, in the course of its investigation, freely disclosed to others the allegations it was investigating. Yet, years after the investigation was concluded in Hughes' favor, the court below held that a former Hughes employee can proceed to trial against Hughes as a *qui tam* plaintiff under the False Claims Act ("FCA" or "the Act"), 31 U.S.C. §§ 3729 *et seq.* *United States ex rel. Schumer v. Hughes Aircraft*, 63 F.3d 1512 (9th Cir. 1995). A case more removed from the Act's purpose of assisting the government to ferret out fraud would be difficult to conjure.

The Ninth Circuit's holding that the 1986 Amendments apply retroactively disregards the principles laid down by this Court in *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994).

Under the government-information test that determined the availability of private-plaintiff lawsuits before the 1986 Amendments, Hughes became effectively immune from a *qui tam* action when the government was advised of alleged irregularities in Hughes' accounting system, which had been in place long before the 1986 Amendments. Now, some ten years later, Hughes faces a *qui tam* trial because the Ninth Circuit, notwithstanding the palpable stakes in this case, concluded that the new law " 'did not change the legal consequences of' " Hughes' conduct. *Schumer*, 63 F.3d at 1517 (quoting *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 814 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 700 (1996)). This was a misreading of *Landgraf*.

Landgraf reinforced the presumption against retroactive application of new laws where Congress has not explicitly required prospective application and where the law attaches new legal consequences to past conduct. Although the presumption does not apply to purely "jurisdictional" statutes, in the sense of laws that change the tribunal, this is because settled expectations about the legal consequences of one's conduct are not implicated by a mere change in tribunal. But it is the impact of a new law that controls, not its semantics. In seizing on the word "jurisdiction" in section 3730(e)(4)(A) of the Act, the Ninth Circuit favored the semantics, leading it to reverse the traditional presumption and apply new substantive law retroactively. *Landgraf* does not permit this result.

Its error on the retroactivity question caused the Ninth Circuit to apply the new public-disclosure test of the 1986 Amendments, 31 U.S.C. § 3730(e)(4)(A), in place of the government-information test. As relevant to this case, the public-disclosure test required determining whether there had been a public disclosure of allegations in an administrative investigation, where government investigators told various innocent employees of Hughes and another company, all of whom were

strangers to the fraud, about the allegations. *Schumer* found no public disclosure on the grounds that employees of a company under investigation cannot be considered members of the public. This broad conclusion rested on the court's view that the economic incentives facing employees are too strong to "trigger the potential for corrective action" under the Act. *Schumer*, 63 F.3d at 1518. As additional support, *Schumer* announced that "the government, contractors, and subcontractors operate within a closed loop of secrecy," *id.*, so that all discussions among them must be deemed private. The court's disposition thus rested, essentially, upon psychological and sociological conclusions.

The False Claims Act does not endorse this loose approach. The Act nowhere suggests that the government cannot make a public disclosure to the employees of a company under investigation or to employees of other companies. Generalization about how an audience might react after hearing fraud allegations — keeping them confidential, disclosing them, or filing a *qui tam* lawsuit — do not illuminate their public or private character.

Nor does the Act sanction any special rule for the defense-procurement industry. Congress made no finding that unrestricted government disclosures about a fraud investigation to a defense contractor's employees constitute sensitive security information or are otherwise private in any way. The Ninth Circuit's generalization on this score has no greater support in the Act or its legislative history than its preconceptions about employees' willingness to sue their employers.

Congress fully recognized the special role of company employees as potential *qui tam* plaintiffs when it amended the Act in 1986, providing special statutory protections for employees who blow the whistle, including employees in the defense-procurement industry. More broadly, the structure

and text of the Act reveal Congress' latest attempt to balance competing concerns about how to encourage some *qui tam* suits while forbidding others. Using the concept of "public disclosure" to tip the balance is not the courts' function. Rather, creating exceptions for employees, defense contractors, or any other group, based on a court's subjective view of whether the allegations are more or less likely to be acted upon, simply rewrites the Act. The public disclosure that occurred in this case should have ended the lawsuit, even under the mistaken application of current substantive law.

ARGUMENT

A. The Public-Disclosure Test of the False Claims Act Can Apply Only Prospectively.

In *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994), the Court crystallized the extensive jurisprudence governing whether a new law may be applied retroactively absent explicit legislative direction requiring that result.[1] *Landgraf* clarifies that "prospectivity remains the appropriate default rule," thus confirming "the well-settled presumption against application of the class of new statutes that would have genuinely 'retroactive' effect," *id.* at 1501, 1503. As the Court phrased the test, whether a new statutory provision has genuinely retroactive effect depends upon whether it

[1]There has been no suggestion in this case that any express statement or clear congressional intent favors retroactive application of section 3730(e)(4)(A). *See also Hyatt v. Northrop Corp.*, 80 F.3d 1425, 1428 (9th Cir. 1996) ("Congress has not expressly indicated whether the 1986 amendments to the FCA apply retrospectively . . . ."), *petition for cert. filed*, No. 96-17 (Jul. 2, 1996); *Schumer*, 63 F.3d at 1517 ("Congress did not demonstrate an intent that the FCA should apply retrospectively.") (citations omitted).

> would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.

Id. at 1505. In brief, a law has impermissible retroactive effect if it "attaches new legal consequences to events completed before its enactment." *Id.* at 1499.[2] If so, it "does not govern absent clear congressional intent favoring such a result." *Id.* at 1505.

Exposing FCA defendants to a cause of action from a large and indeterminate number of potential *qui tam* plaintiffs, which is precisely the effect of section 3730(e)(4)(A), "increase[s] a party's liability for past conduct" and "attaches new legal consequences" to past events within the meaning of *Landgraf*. The unfairness inherent in any retroactive operation of laws is intensified in this case because elimination of the government-information test upsets legitimate expectations and frustrates planning. Under the government-information test, a defendant could foreclose all *qui tam* lawsuits by engaging in certain specific and appropriate conduct: disclosing to the government the allegations of fraud. The new law eliminated the legal benefit flowing from that ameliorative conduct and extracted a new price — effecting a "public disclosure" — for limiting the number of potential *qui tam* plaintiffs who might bring the suit. In this sense, the new law

[2] *Landgraf* cited approvingly several other formulations of the test from previous cases and commentary. Thus, a law operates retroactively, and can be applied only prospectively, if it "changes the legal consequences of acts completed before its effective date," *Weaver v. Graham*, 450 U.S. 24, 31 (1981); gives "a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed," *Union Pacific R.R. Co. v. Laramie Stock Yards*, 231 U.S. 190, 199 (1913); or "operate[s] on transactions which have occurred or rights and obligations which existed before passage of the act," 2 N. Singer, Sutherland on Statutory Construction § 41.01, p. 337 (5th rev. ed. 1993).

"impair[s] rights a party possessed when he acted" and "impose[s] new duties with respect to transactions already completed." *Id.* The "well-settled presumption" against retroactive application of laws must operate in this case.

1. The 1986 Amendments Expanded Defendants' Exposure to *Qui Tam* Lawsuits.

Under the government-information test prior to the 1986 Amendments, parties who were alleged to have committed fraud were completely free from *qui tam* lawsuits "when 'the action [was] based on evidence or information the Government had when the action was brought.' 31 U.S.C. § 3730(b)(4)(1982)." *Hyatt*, 80 F.3d at 1428. Under the public-disclosure test of current law, the very same conduct is subject to a *qui tam* lawsuit, by original sources or others, even if the government already has the information.[3] That the change in the law greatly expanded the circumstances under which allegedly fraudulent conduct would be subject to a *qui tam* lawsuit is unassailable. *See, e.g., United States v. TRW, Inc.*, 4 F.3d 417, 422 (6th Cir. 1993) ("The amendments expand the circumstances under which citizens may bring false claims suits . . . ."), *cert. denied sub nom. Eagleye v. TRW, Inc.*, 114 S.Ct. 1370 (1994); *United States ex rel. Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1153 (2nd Cir. 1993) ("Congress . . . create[d] a legal interest and confer[red] stand-

[3] The 1986 Amendments provided that

> No court shall have jurisdiction over an action under [the section on civil actions under the FCA] based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. §3730(e)(4)(A).

ing to assert it."), *cert. denied*, 508 U.S. 973 (1993); *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 19 (1st Cir. 1990) ("Basically, Congress broadened the universe of potential plaintiffs . . . ."), *cert. denied*, 499 U.S. 921 (1991).

The fact that a new statute encompasses conduct previously prohibited or subject to monetary liability is not dispositive of whether it changes the legal consequences of past conduct. The Court in *Maitland v. University of Minnesota*, 43 F.3d 357 (8th Cir. 1994), correctly rejected the argument that "[s]ubstantive changes . . . are [only] 'those which make illegal conduct which was legal before the change in the law,' " stating that this formulation "defines a substantive change too narrowly and in a manner inconsistent with the Supreme Court's definition of true retroactive effect as set out in *Landgraf*." *Id.* at 362. Nor is a statutory increase in direct financial penalties required. Permitting, barring, or resurrecting causes of action are "legal consequences." *Landgraf*, 114 S.Ct. at 1506 ("§ 102 can be seen as creating a new cause of action . . . ."); *Million v. Frank*, 47 F.3d 385, 390 (10th Cir. 1995) (forcing the defendant to defend a cause of action previously time-barred substantially increases defendant's liability). To say that the "extent of a party's liability . . . cannot be ignored," *Landgraf*, 114 S.Ct. at 1507, is not to say that all other legal consequences *can* be ignored.

Whereas FCA defendants were formerly liable to suit only by the government in cases where the government had the information, the law now encourages any number of *qui tam* plaintiffs to be the first to sue even if the government chooses not to proceed, as happened in this case. Potential liability to party A (the government) for allegedly wrongful conduct is certainly a legal consequence. Potential liability also to parties B, C, or D . . . (*qui tam* plaintiffs) for the same conduct is obviously a more dire legal consequence. In this case, where the

government chose not to sue because it had not been harmed (but actually benefited), the difference is between exoneration and protracted litigation. But in any case, unless reality is ignored, adding to the litigants potentially arrayed against a party increases that party's legal liability.[4]

While the change in the law did not alter the underlying obligation not to commit fraud, *see United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1408 (9th Cir. 1995), *cert. denied sub nom. United States ex rel. Willis v. General Dynamics Corp.*, 116 S.Ct. 1319 (1996), it did substantially alter the legal effect of that conduct. Worse yet, however, it altered the legal effect of innocent conduct, because both the government-information test and the public-disclosure test are keyed to the mere lodging of fraud allegations. Therefore, whether the target is culpable or innocent, "the law imposes additional burdens based on conduct that occurred in the past." *Landgraf*, 114 S.Ct. at 1506 n. 35.

2. The 1986 Amendments Curtailed Defendants' Ability to Take Remedial Action Reducing Their Liability.

The change wrought by section 3730(e)(4)(A) not only increased FCA defendants' legal burden substantially, it constituted "the type of legal change that would have an impact on private parties' planning." *Id.* at 1506. Under the government-information test, a company that learned of fraud or possible fraud by one of its employees could completely eliminate the threat of any *qui tam* lawsuit by itself informing the

[4]The threat of suit from additional quarters clearly constitutes an increase in "liability." According to Black's Law Dictionary, "The word is a broad legal term . . . . It has been referred to as of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely." *Black's Law Dictionary* 823 (5th ed. 1988).

government of the allegations.[5] The decision to advise the government of one's own possible fraud is not made lightly: at a minimum, it brings an investigation, internal company strife, the likelihood of negative publicity, probable disruption of other government contracts, and the risk of adverse findings even if the company is innocent.[6] Certainly the guilty, but perhaps especially the innocent, have strong incentives to remain silent in the face of allegations of often uncertain validity.

Yet the ability to eliminate *qui tam* actions is a powerful counter-incentive. A company that believed the allegations were spurious might conclude that full disclosure to the government would permit vindication without litigation, with minimal publicity, and with a relatively prompt return to normalcy, all of which would likely compare favorably to a federal-court lawsuit by a *qui tam* plaintiff induced by the prospect of an enormous recovery. Even companies who discover true fraud within their ranks might rationally prefer dealing with dispassionate, experienced government investigators, more likely than financially motivated *qui tam* plaintiffs to place the wrongdoing in proper perspective, administer an appropriate sanction, and put the matter in the past.

When it adopted the public-disclosure test, Congress removed these incentives entirely. A company's conduct could no longer eliminate the threat of a *qui tam* lawsuit and only by making a

[5]In *Anderson*, 52 F.3d at 814, the court overlooked this critical point in stating, "If Northern Telecom really did submit a fraudulent claim, it became liable and remained liable to the government *and* to potential *qui tam* relators." (Emphasis added). Under prior law, if the government had the information no *qui tam* action would lie.

[6]This case shows that mistakes can be made. The government's initial investigation caused it to withhold $15.4 million from Hughes, a penalty it reversed much later. It is the proverbial "uncertainties of litigation," and its expense, that constitute adverse legal consequences even to innocent defendants. *Schumer*, 63 F.3d at 1516.

public disclosure of the allegations could the alleged wrongdoer limit the category of possible *qui tam* plaintiffs, *i.e.*, to those who qualify as an "original source." In short, in many cases, the new law extracts a far dearer price to obtain far less protection from liability in a *qui tam* lawsuit.

In an analogous context, *Landgraf* deemed it significant that notice of the new law could have influenced a defendant's conduct:

> The new damages provisions of § 102 can be expected to give managers an added incentive to take preventive measures to ward off discriminatory conduct by subordinates *before* it occurs, but that purpose is not served by applying the regime to preenactment conduct.

Landgraf, 114 S.Ct. at 1506 n. 35 (emphasis in original). Likewise, the new law in this case removed a significant incentive for potential FCA defendants to disclose allegations of fraud promptly to the government. *See, e.g., TRW, Inc.*, 4 F.3d at 419 (defendant informed government of internal investigation revealing accounting irregularities). Whether a company commits fraud does not likely hinge on the availability *vel non* of *qui tam* lawsuits; whether a company *reports allegations of fraud* may well depend on that factor. Certainly the target's conduct — silence, informing the government, or making a public disclosure — is directly relevant to the remedial purposes of the Act.[7] Under these circumstances, changing the legal

[7]"One theme recurring through the legislative history in 1985 is the intent to encourage persons with first-hand knowledge of fraudulent misconduct to report fraud." *United States ex rel. Stinson v. Prudential Insurance Co.*, 944 F.2d 1149, 1154 (3rd Cir. 1991). This was to include "individuals who are either close observers or otherwise involved in the fraudulent activity." *Id.* (citation omitted). *See also Wang. v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992) ("*Qui tam* suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime.").

consequences of the allegedly wrongful conduct cannot be given retroactive application.

3. Section 3730(e)(4)(A) Is Not "Jurisdictional" for Purposes of Retroactive Application.

Landgraf's extensive analysis of the principles governing the retroactivity of legislation recognized that, notwithstanding "a *presumption* against retroactivity . . . , application of new statutes passed after the events in suit is unquestionably proper in many situations." *Landgraf*, 114 S.Ct. at 1501 (emphasis in original). One such situation concerns "intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.*

But *Landgraf* did not hold that every statutory provision that may be couched in jurisdictional terms is presumed to apply retroactively. The Court's explanation was considerably more refined:

> Application of a new jurisdictional rule *usually* "takes away no substantive right but *simply changes the tribunal* that is to hear the case." Present law *normally* governs in such situations because jurisdictional statutes "speak to the power of the court *rather than to the rights or obligations of the parties* . . . ."

Id. at 1502 (emphasis added) (citations omitted). Indeed, in the seminal case embodying the "jurisdictional rule," *Bruner v. United States*, 343 U.S. 112, 117 n.8 (1952), the Court pointedly stated:

> This jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication.

Schumer thus misstated the analysis when it said: "The *Landgraf* Court, however, carved out an exception to that rule [presuming only prospective application] in the case of jurisdictional statutes." *Schumer*, 63 F.3d at 1517. Retroactive *application* of jurisdictional laws is not an exception to the ban on retroactive *operation* of substantive rules. It is only because true jurisdictional statutes do not attach new legal consequences to past conduct — they do not change the substantive law — that they are applied retroactively. When a new statute has a genuine retroactive effect because it changes substantive law, labeling it "jurisdictional" shifts no presumptions.[8]

In noting that jurisdictional statutes *usually* only "change the tribunal that is to hear the case" and *normally* do not speak to "the rights or obligations of the parties," *Landgraf*, 114 S.Ct. at 1502 (citation omitted), *Landgraf* left room for provisions that sound in jurisdiction but have nothing to do with changing tribunals and everything to do with parties' substantive rights. Such is section 3730(e)(4)(A), which did not change tribunals, but rather *limited* the circumstances under which *no* court shall have jurisdiction, thereby providing additional persons with a *qui tam* cause of action. Courts have readily acknowledged this as a sweeping substantive change. *See, e.g., Anderson*, 52 F.3d at 813 ("an entirely new scheme"); *TRW, Inc.*, 4 F.3d at 422 (expanding the circumstances for citizen suits); *Kreindler*, 985 F.2d at 1153 (creating new legal interests); *LeBlanc*, 913 F.2d at 19 (broadening the universe of potential plaintiffs).

---

[8]The confusion surrounding the phrase "jurisdictional bar" is illustrated in *Stinson*, 944 F.2d at 1152, n.1. The court characterized 31 U.S.C. § 3730(e)(3), which forecloses certain *qui tam* actions where the government is a party, as a "jurisdictional bar" even though the provision does not contain the word "jurisdiction" and has nothing to do with where a case can be heard. Just as subsection (e)(3) is not jurisdictional, subsection (e)(4), which operates in identical fashion to bar other *qui tam* actions, is not either.

The new public-disclosure test is thus a different legal animal from the jurisdictional provisions in *Bruner* and other cases, which involve only changes in which tribunal has power to hear a case. *See Bruner*, 343 U.S. 112 (jurisdiction in Court of Claims or district court); *Hallowell v. Commons*, 239 U.S. 506 (1916) (jurisdiction in Secretary of Interior or district court); *Assessor v. Osbornes*, 76 U.S. (9 Wall.) 748 (1870) (jurisdiction in state court or circuit court); *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604 (1978) (jurisdiction in federal court or state court); *Smallwood v. Gallardo*, 275 U.S. 56 (1927) (jurisdiction in Puerto Rico or federal court). *Landgraf's* careful explanation accommodates this difference; *Schumer* did not.

Accordingly, there is no reason to reverse the presumption in this case. As stated in *United States ex rel. Fallon v. Accudyne Corp.*, " 'Jurisdiction' is a notoriously plastic term.":

> For what it is worth, we doubt that § 3730(e)(4)(A) uses the word "jurisdiction" in the sense of adjudicatory power, which is conferred by §§ 1331, 1345, and 3732(a) rather than "this section" (sec. 3730). In context, the word appears to mean that once information becomes public, only the Attorney General and a relator who is an "original source" of the information may represent the United States. This does not curtail the categories of disputes that may be resolved (a real "jurisdictional" limit) but instead determines who may speak for the United States on a subject, and who if anyone gets a financial reward. "Jurisdiction" is a notoriously plastic term.

97 F.3d 937, 941 (7th Cir. 1996). Because section 3730(e)(4)(A) effects a major change in substantive law, its use of the word "jurisdiction" is of no moment and "prospectivity remains the appropriate default rule" in this case. *Landgraf*, 114 S.Ct. at 1501.

B. There Was A Public Disclosure In This Case.

In this case, it is undisputed that the government disclosed the allegations of fraud to various individuals who were either employees of Hughes, the target company, or employees of Northrop, which had a contract with Hughes and which alerted the government to Hughes' alleged accounting irregularities. None of these employees was suspected of being involved in the alleged fraud. As far as appears in the opinion, none of them was advised that the information disclosed to them was secret, confidential, or "nonpublic" in any way. Yet *Schumer* held that no "public disclosure" could have occurred because these strangers to the fraud happened to be employees of one or the other company. The court added its opinion that the government and defense contractors inherently operate in secret. *Schumer*, 63 F.3d at 1518-19.

Schumer's holding rests not on the text of the False Claims Act, but on the court's belief that the purposes of the Act would be best served by an across-the-board rule that disclosures to employees are not public. Without questioning Hughes' claim that there was an unrestricted disclosure, the court nonetheless deemed the information to have been " 'disclosed in private.' " *Id.* (citation omitted). This characterization had nothing to do with the nature of the information, the number of recipients, any known caution or advice on further dissemination, or any other specific indicia of confidentiality. It was simply the court's judgment that employees of the defendant company and its subcontractor are not " 'members of the public' to whom 'public disclosure' can occur." *Id.* (citation omitted).

Schumer's gloss on section 3730(e)(4)(A) contrasts with the Second Circuit's straightforward reading in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992), holding that "[o]nce allegations of fraud are revealed to mem-

bers of the public with no prior knowledge thereof, the government can no longer throw a cloak of secrecy around the allegations . . . ."[9] Eschewing *Doe*'s neutral reading, *Schumer* adopted the *Doe* dissent, putting employees into a special category:

> We decline to adopt the rule of *Doe* for application in this circuit. At one level, the *Doe* court's treatment of company employees as members of the public is unrealistic. Unlike others who come across information related to fraud, an "innocent employee who comes forward with allegations of fraud by her employer knows that her job may be in jeopardy." *Doe*, 960 F.2d at 325 (Walker, J. dissenting). ***Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure.*** Because disclosure of such allegations could reflect negatively on both Northrop and Hughes, this reasoning applies to employees of both companies.

Schumer, 63 F.3d at 1518 (emphasis added).

Schumer then applied equally broad reasoning to the defense procurement industry:

> Indeed, this circuit has indicated that disclosure by one government employee to another would not constitute public disclosure. *See United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991). Yet ***in the context of defense procurement, security considerations generally require that the government, contractors, and subcontractors operate within a closed loop of secrecy.*** We see no principled distinction between disclosure to other government employees and to employees of defense contractors and subcontractors. Both situations involve the release of information within a private sphere.

Id. (emphasis added).

This second sweeping assessment, this time characterizing the defense industry, creates doubt about *Schumer*'s intended reach. At one level, *Schumer* holds that when the government shares fraud allegations with a target company's employees and employees of companies somehow related to the subject matter, there is no public disclosure. A narrower reading would restrict this holding to employees (of either company) if they are in the defense procurement industry. But both readings depend on the court's view of what the Act should have said, not what it says.

1. There Is No Exception for Employees.

Schumer makes a blanket finding that company employees will not blow the whistle on their employers: "Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure." *Id.*

This is a remarkable statement. Three years before it decided *Schumer*, the Ninth Circuit acknowledged that "[t]he paradigm *qui tam* plaintiff is the 'whistleblowing insider.' "

[9] *Doe* made an explicit finding that "[w]hen these innocent employees learned of the fraud, they were under no obligation to keep this information confidential." *Doe*, 960 F.2d at 323. *Schumer* obviously found this fact, which appears to be present in this case as well, irrelevant to its analysis.

Wang, 978 F.2d at 1419 (citation omitted). *Wang* quoted the Third Circuit in *Stinson*, which viewed company employees as the primary source of *qui tam* litigants:

> The paradigmatic "original source" is a whistleblowing insider. This covers those the Senate Report specifically referred to: "individuals who are close observers or otherwise involved in the fraudulent activity." S. Rep. No. 345, at 4, reprinted in U.S. Code Cong. & Admin. News 5269. *Other relators may also qualify* if their information results from their own investigations.

Stinson, 944 F.2d at 1161 (emphasis added).

The Ninth Circuit's recognition that Congress expected company employees to comprise an important source of *qui tam* plaintiffs begs the question why, according to *Schumer*, Congress failed to provide adequate incentives for employees to come forward. The answer is that Congress provided the incentives and protections it saw fit, including specific protections for company employees. *Schumer* simply usurps that legislative prerogative.

It does so on the assumption, indistinguishable from a legislative judgment, that employees have insufficient incentive to become whistleblowers. Indeed, soon after it rendered *Schumer*, the Ninth Circuit again offered its view of the appropriate inducement for employees to file *qui tam* actions:

> Recall, in this light, that the False Claims Act provides a statutory fine of between $5,000 and $10,000 for every false claim submitted to the government, as well as triple compensatory damages. The relator is entitled to share in as much as 30% of the settlement or judgment depending on whether the United States intervenes in the action. Thus, potential recoveries for qui tam relators are staggeringly large, as well they should be for insiders in private companies who risk their jobs and reputations when they blow the whistle on their own employers.

United States ex rel. Fine v. Chevron, U.S.A., Inc., 72 F.3d 740, 743-44, n.3 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1877 (1996). The Ninth Circuit apparently believes that even "staggeringly large" potential recoveries are inadequate incentive for employees to bring fraud to light. *Schumer*, 63 F.3d at 1518. Accordingly, as *Schumer*'s reasoning goes, the government's unrestricted release of fraud allegations to employees have "not been publicly disclosed." *Id.*

This redraft of the Act contradicts Congress's specific consideration of how to foster *qui tam* lawsuits by employees. As noted in a Ninth Circuit opinion rendered some eight months after *Schumer*,

> Prior to 1986, the FCA did not contain any provision for the protection of discharged employees. However, the 1986 amendments to the FCA included the addition of a discharged employee protection provision. This provision states:
>
> > Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under [the FCA] . . . shall be entitled to all relief necessary to make the employee whole.
>
> 31 U.S.C. § 3730(h).

Hyatt, 80 F.3d at 1430. *Schumer* concludes that these additional protections are still inadequate, justifying its gloss on "public disclosure." But where Congress directly addressed employees' "economic incentive to protect the information from outsiders," *Schumer*, 63 F.3d at 1518, courts must respect that legislative judgment.

Schumer's failure to do so led it to speculate about the fears and motivations of an entire group of *qui tam* plaintiffs in determining whether the disclosure is likely to "trigger the potential for corrective action." *Id.* Indeed, the dissent in *Doe*, which *Schumer* adopted at least in part, *id.*, candidly called for a plaintiff-by-plaintiff prediction of future conduct:

> I do not agree that advising individual employees of the targeted organization would *necessarily* constitute a public disclosure under the statute . . . . Thus, in assessing whether or not there has been a public disclosure, courts should be focusing on whether there has been a sufficient dissemination such that it is reasonably likely that the fraud will come to light . . . . [T]here *might be* a public disclosure where the fraud is privately disclosed to people with an incentive to bring the fraud to public attention. However, I think it unlikely that this standard would be met *in the present case* . . . .

960 F.2d at 324-25 (Walker, J., dissenting) (emphasis added).

It is unclear whether *Schumer* endorses the plaintiff-by-plaintiff approach or only the group approach,[10] but each poses intractable problems. An exception for company employees, while simple enough to apply, ignores the diverse motives

[10] *Schumer*'s inclusion of Northrop's employees in its reasoning, even though Northrop initiated the government investigation, at least makes it clear that its holding is not limited to target-company employees.

among employees, many of whom have proven quite willing to file *qui tam* suits. Employees of non-target companies are even harder to characterize, with the employee seeing himself as hero or outcast — "insider" or "outsider" — depending on the circumstances. Adjudication by stereotype is inherently flawed.

The same morass surrounds other groups. Companies and individuals in various positions have varying economic stakes in the fortunes of those with whom they transact business. For example, a given supplier may be highly dependent on a large customer who becomes the object of fraud allegations, providing a strong incentive not to blow the whistle. Yet a disgruntled supplier — or employee, or customer, or competitor, *ad infinitum* — may leap at the chance even absent a potential *qui tam* recovery. The relevant motivations and perceptions of interest will change constantly with the myriad circumstances that influence relationships between companies and the personalities involved. In short, this is exceedingly slippery terrain.

The litigant-by-litigant approach is not an improvement. Prospective and retired employees, who may be just as likely as current employees to become privy to government investigations, also have unique and variable incentives. Cases will arise where disclosures are made simultaneously to employees and non-employees, or to employees of companies who would not be tainted, but rather exonerated, by the allegations. Or the plaintiff's conduct may belie the stereotype — perhaps the employee who receives the information does not keep it secret, but feeds it to the rumor mill, *or files a qui tam action.*[11]

[11] *Schumer* does not state how it would handle the public disclosure issue when the company employee actually files the *qui tam* suit, given its broad conclusion that "treatment of company employees as members of the public is unrealistic." *Schumer* 63 F.3d at 1518.

The omnipresent pressure to protect company secrets, so certain and significant in *Schumer*, in reality varies with each employee's compensation, personal financial needs, job satisfaction, moral code, and innumerable other elusive factors.[12] The Ninth Circuit's approach, insofar as it approves the dissent in *Doe*, would have courts reading minds in order to determine who is likely to keep a secret.

2. There Is No Exception for the Defense Procurement Industry.

Claiming it to be a " 'practical, commonsense interpretation' " of section 3730(e)(4)(A), *Schumer* holds that government disclosures to "employees of defense contractors and subcontractors" are not public disclosures. *Schumer*, 63 F.3d at 1518 (quoting *Stinson*, 944 F.2d at 1161). This holding rests on the court's observation that, "in the context of defense procurement, security considerations generally require that the government, contractors, and subcontractors operate within a closed loop of secrecy." *Id.*

This was an especially odd case for relying on generalities, because *Schumer*'s factual predicate was that the material the government disclosed was *not* classified. *Id.* (recounting Hughes' allegation "that Schumer's action is barred because it is based upon *unclassified* government audits which have been disclosed publicly" (emphasis added)). Without disputing Hughes' characterization, *Schumer* simply relied on what "security considerations generally require." *Id.* Yet this very case belies the general rule.

Nor is *Schumer* unique in presenting a *qui tam* action against a defense contractor where national security or other govern-

[12]One such factor, of course, is whether the employee or other recipient even perceives the information as secret, especially where the government freely discloses it without restriction.

ment secrets played no part in the case. *See, e.g., Hyatt*, 80 F.3d at 1429 (complaint not filed under seal); *Lindenthal*, 61 F.3d 1402 (no mention of government secrets or national security)[13]; *TRW, Inc.*, 4 F.3d at 420 (allegations appeared in the news media); *Kreindler*, 985 F.2d at 1158 (information "available to anyone who wished to consult the court file"); *Wang*, 975 F.2d at 1417 (allegations discussed in newspaper accounts); *Doe*, 960 F.2d at 322 ("allegations of fraud . . . divulged to strangers to the fraud"); *LeBlanc*, 913 F.2d 17 (no mention of government secrets or national security).

Cases may arise where government security considerations prevent the public disclosure of fraud allegations. Other cases may involve obvious public disclosures notwithstanding security restrictions. In any case, however, the issue is whether a public disclosure occurred, not whether an industry or setting is "generally" characterized by secrecy. *Schumer*'s holding that public disclosures simply do not occur in the government-defense contractor setting, or occur so rarely that courts need take no account of them, ignores the almost daily fare of the nation's newspapers.

Beyond its misapprehension about defense contracting, *Schumer*'s fundamental error is its value-laden approach to interpreting statutory terms based on speculation about the purposes of the Act. *Schumer*'s attempt to foster more *qui tam* suits even though the government already has the information and discloses it to others, 63 F.3d at 1518-19, led it to create broad categories of "public" and "private" disclosure that have no support in the text, structure, or legislative history of the 1986 Amendments. If Congress had employed such

[13]*Lindenthal* involved a few documents that were found to be either internal company memoranda or private correspondence between the company and the government. Although they were held not to have been publicly disclosed, nothing about any national security or government secrets was mentioned in the opinion.

generalizations, inaccurate though they might be, at least it would be the legislature doing the legislating, rather than individual courts attempting to promote one or another competing purpose of the Act.[14]

In any event, *Schumer*'s belief that its holding is necessary "to avoid total reliance on government enforcement," *id.* at 1519, is wrong: the 1986 Amendments permit original sources to become *qui tam* plaintiffs even if the government has the information and even if there has been a public disclosure. Although certain parasitic *qui tam* actions will be foreclosed, original-source lawsuits will not. Perhaps most importantly, even if no *qui tam* suit is filed, the government cannot shroud the allegations in secrecy, sitting on the fraud without public scrutiny, once it abandons exclusive knowledge of them by disclosing them to strangers to the fraud. The text and structure of section 3730(e)(4)(A) reveal this to be the balance that Congress struck. The courts must respect it.

---

[14]As the Fourth Circuit has stated:

> [A]lthough we can perhaps divine from these abstract purposes a congressional intention to balance the need to encourage qui tam actions against the need to prevent parasitic suits, we can discern virtually nothing as to precisely how Congress ultimately believed it achieved that balance. If the language of the law is to have any meaning at all, then surely it must prevail over the kind of speculation that is entailed in such an enterprise as these courts have undertaken.

United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1354-55 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 316 (1994).

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

November 29, 1996

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER

Respondent.

On Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LOCKHEED MARTIN CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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No. 95-1340

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER

Respondent.

BRIEF OF LOCKHEED MARTIN CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

Amicus curiae Lockheed Martin Corporation urges the Court to reverse the Ninth Circuit on the questions presented by the Petitioner. The written consent of the parties to the filing of this *amicus* brief has been filed with the Court.

INTEREST OF THE AMICUS CURIAE

Lockheed Martin Corporation ("Lockheed Martin") is a highly diversified advanced technology corporation comprised of eighty-five operating companies and approximately 190,000 employees. Its core businesses are in aeronautics; command, control, communications, intelligence and systems integration; electronics; energy and environment; information and services; and, space and strategic missiles. Lockheed Martin is the largest

contractor for the Departments of Defense and Energy, and NASA. Its government contracts are subject to extensive legal and regulatory requirements and, frequently, government agencies audit and investigate whether the corporation's operations are being conducted in accordance with these requirements.

Lockheed Martin has been directly affected by the False Claims Act ("FCA") Amendments of 1986 ("1986 amendments"), Pub. L. No. 99-562, 100 Stat. 3153, 31 U.S.C. §§ 3729, *et seq.*, which have stimulated a substantial increase in the number of *qui tam* actions brought by individuals (or "relators"), on behalf of the government against government contractors.1/ Lockheed Martin, through Lockheed Missiles and Space Company, Inc., is currently the defendant in a *qui tam* action entitled *United States ex rel. Newsham v. Lockheed Missiles and Space Co., Inc.*, No. C 88-20009 JW (N.D. Cal.) (hereafter

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1/ While the FCA allows the government to intervene in the action (31 U.S.C. § 3730(b)(4) (1986)), in the vast majority of cases the government has declined to intervene. *See* Department of Justice *Qui Tam* Statistics, printed in 64 Fed. Contracts Rpt. 348-49, 362 (BNA Oct. 23, 1995) (hereafter "Statistics") (From FY 1987 through FY 1995, 1,105 *qui tam* actions were filed. The government intervened in only 189 cases, and declined 672 cases; the remainder, presumably, were still under seal.) Historically, when the government declines to intervene, the relator's action has been subject to certain limitations. Prior to the 1986 amendments, the relator's action was barred if it was based on information already known to the government. 31 U.S.C. § 3730(b)(4) (1982). Under the amended provision, government knowledge, by itself, no longer bars a *qui tam* action. Rather, the action is barred if it is based upon the "public disclosure" of allegations or transactions in a criminal or civil action, administrative hearing, report, audit or investigation, or in the news media, unless the relator is an "original source" of the information, in which case that relator is authorized to pursue the action. 31 U.S.C. § 3730(e)(4) (1986).

"*Newsham*"). That action turns on two of the questions presented in Hughes' petition concerning the right to maintain a *qui tam* action: (a) whether applying the "public disclosure" provision of the 1986 amendments to pre-amendment conduct is an impermissible retroactive application of that provision, and (b) how to define a "public disclosure."2/

On both issues, Hughes asserted below a view shared by Lockheed Martin. First, to allow a *qui tam* action based on information the government possessed prior to the 1986 amendments would be an improper retroactive application of the "public disclosure" provision because it would increase a contractor's liability by requiring it to defend an action that was barred under the pre-1986 FCA. Second, to allow a *qui tam* action based on a government audit that was publicly disclosed through its wide distribution within

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2/ In *Newsham*, the relators allege false charging of labor hours on government contracts. One of the relators disclosed virtually all of the allegations to the government in 1984, well before the 1986 amendments were enacted. In addition, prior to 1986, the government's Defense Contract Audit Agency audited those allegations. The audit reports were distributed to Lockheed and reviewed by the government's contracting officers, who determined that no claim against Lockheed was appropriate. *See* Memorandum of the United States As Amicus Curiae, *United States ex rel. Newsham v. Lockheed Missiles and Space Co. Inc.*, No. C 88-20009 JW (reprinted in Appendix ("App.") (1a-17a) at 4a-5a). The *qui tam* action, filed in 1988, is based on the same allegations that the government had investigated prior to 1986. After investigating the allegations for the second time, the government declined to intervene. The court denied Lockheed's motion to dismiss under the pre-1986 "government knowledge" provision, holding that the amended "public disclosure" provision applies to the case even though the alleged misconduct arose prior to the 1986 amendments and had previously been investigated by the government. *Newsham*, 907 F. Supp. 1349, 1358 (N.D. Cal. 1995).

a company is inconsistent with the FCA, as amended, and could result in a *qui tam* action by a company employee whenever an audit contained adverse findings.

The Ninth Circuit rejected both arguments. Therefore, this Court's decision will have a significant effect on current and possibly future litigation against Lockheed Martin and other contractors.

SUMMARY OF ARGUMENTS

1. The 1986 FCA amendment repealing the "government knowledge" bar cannot be applied retroactively. The pre-1986 FCA provided a bright line defense to *qui tam* actions based on information the government possessed when the action was filed. 31 U.S.C. § 3730(b)(4) (1982). Under that rule, contractors were secure in knowing that the government's knowledge of relevant information freed them from the threat of *qui tam* actions. Applying the "public disclosure" provision, enacted in 1986, to pre-1986 conduct removes that security and exposes contractors to expensive litigation and the risk of substantial liability. Accordingly, under *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), the public disclosure provision cannot be applied retroactively because it would "increase a party's liability for past conduct" and "impose new duties with respect to transactions already completed." 114 S. Ct. at 1505.

2. The allegations, which were the subject of a government audit and investigation, were "publicly disclosed" in accordance with the plain meaning of that term and Congress' intent. The government, having received information from one of Hughes' customers (Northrop Corporation) about allegations of wrongdoing at Hughes (Joint Appendix ("J.A.") at 20), commenced an audit and investigation. Its investigative findings and audit reports were disclosed throughout Hughes and to Northrop prior to Schumer filing his *qui tam* action which raised the same allegations as those in the audit reports. J.A. at 37, 42, 45-47, 55, 64, 66. Under the amended FCA, a *qui tam*

action is subject to being barred if it is "based upon the public disclosure of allegations or transactions in a[n] . . . administrative . . . audit or investigation." 31 U.S.C. § 3730(e)(4)(A). The disclosures in question are "public disclosures" within the meaning of section 3730(e)(4)(A).

I. THE REPEAL OF THE "GOVERNMENT KNOWLEDGE" BAR CANNOT BE APPLIED TO PRE-AMENDMENT CONDUCT.

In *Schumer* and in *Newsham*, the government became aware of the alleged wrongdoing prior to the enactment of the 1986 FCA amendments. By virtue of that knowledge, any *qui tam* lawsuit based on those allegations was barred outright under the pre-1986 FCA. The companies were secure in knowing that *qui tam* enforcement -- a statutory scheme distinct from the investigatory and enforcement mechanisms available to the government -- was absolutely precluded. In both cases, the government undertook enforcement efforts with the full cooperation of the companies and eventually determined that neither an FCA action nor an administrative contract action was appropriate.

The 1986 amendments repealed the government knowledge bar to *qui tam* actions. If that act of repeal is held to apply retrospectively to Schumer's and to Newsham's complaints -- each filed after 1986 -- the effect would be to breathe new life into two lawsuits that should have been absolutely precluded. The Ninth Circuit applied the 1986 amendment to the *Schumer* action, finding that it "'did not alter [the contractor's] underlying liability; it only altered the conditions under which a *qui tam* relator can bring an action to enforce that liability.'" *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512 (9th Cir. 1995), reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") (1a-31a), at 7a (quoting *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1319 (1996)).

The effect of that decision is profoundly unfair to Hughes (as well as to Lockheed Martin which, but for retrospective application, would have avoided what has become a complex, costly, and lengthy (eight-year) burden of defending a lawsuit the government deemed to be without merit). This Court has held that such an effect cannot be imposed unless "Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Landgraf*, 114 S. Ct. at 1501.

A. Regardless Of Whether The Amendment Is "Jurisdictional," It May Not Be Applied To Cases Based On Information The Government Possessed Prior To October 27, 1986 Because That Provision Affects Rights And Obligations Of The Parties.

This Court's decision in *Landgraf* reaffirmed that a statute is presumed to operate only prospectively absent clear congressional intent to the contrary. *Landgraf*, 114 S. Ct. at 1501 (holding that "prospectivity remains the appropriate default rule"). Because Congress did not state whether § 3730(e)(4), or any of the other 1986 FCA amendments, should be applied to cases based on information the government possessed prior to October 27, 1986, the repeal of the government knowledge bar is presumed to operate only prospectively.

Nevertheless, the Ninth Circuit found that there is "a strong presumption that jurisdictional statutes apply retrospectively." Pet. App. at 6a. That finding is not supported by this Court's decisions which are bereft of any language that excuses a jurisdictional provision from the traditional default rule. In *Landgraf*, the Court noted that a jurisdictional provision "*usually* 'takes away no substantive right but *changes* the tribunal that is to hear the case'" and that "[p]resent law *normally* governs in such situations because jurisdictional statutes '*speak to the power of the court rather than to the rights or obligations of the parties.*'" 114 S. Ct. at 1502 (emphasis added; citations omitted). The jurisdictional statutes at issue in the cases cited in *Landgraf* fit that paradigm: they affected the power of the court without extinguishing the rights of the parties.[3/]

The repeal of the government knowledge bar, on the other hand, affects the rights and obligations of the parties. It gives relators a right to sue under circumstances in which they previously could not sue and deprives contractors of a previously available defense. Consequently, even if the provision at issue is "jurisdictional," it cannot be applied retroactively.

3/ *See Bruner v. United States*, 343 U.S. 112, 116-117 (1952) (jurisdictional statute did not alter the validity of the rights and liabilities at issue, but *reduced the number* of tribunals authorized to determine such rights and liabilities); *Hallowell v. Commons*, 239 U.S. 506, 508 (1916) (new jurisdictional statute applied because it "takes away no substantive right but simply *changes* the tribunal that is to hear a case") (emphasis added); *The Assessor v. Osborne*, 76 U.S. (9 Wall) 567, 575 (1870) (dismissing case because diversity jurisdiction was not alleged, and under new statute only state courts had jurisdiction over the claim); *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 607-08 (1978) (in an agency review case, elimination of the $10,000 amount-in-controversy requirement saved complaint that failed to make such allegation); *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899) (granting right of appeal of decisions by the United States court in the Indian Territory; by its terms, statute was to be applied retrospectively); and *United States v. Alabama*, 362 U.S. 602 (1960) (statute conferring jurisdiction over new class of defendants applied, but suit was for injunctive (*i.e.*, prospective) relief), *reh'g denied*, 363 U.S. 857. Similarly, the jurisdictional cases cited in Justice Scalia's concurrence, *Landgraf*, 114 S. Ct. 1523, 1525, involved statutes that merely modified the number of tribunals that could hear a case and/or were expressly retroactive.

B. The Repeal Of The "Government Knowledge" Bar Changes The Legal Consequences of Past Events.

Under *Landgraf*, a statute may not be applied retroactively if it "attaches new legal consequences to *events* completed before its enactment." 114 S. Ct. at 1499 (emphasis added). Thus, the Court must consider the consequences of pre-amendment events for the government and relators as well as for the defendant.[4/] Because under the pre-1986 FCA the government's acquisition of information about alleged false claims barred Schumer's action, the 1986 amendment, if retroactively applied, would change the legal consequences of events that occurred before its enactment.

The result is the same whether: (a) the government acquired the information upon which the action was based *and* the relator filed the complaint *before* the 1986 amendments were enacted (as in *United States ex rel. Hyatt v. Northrop Corp.*, CV-86-6437-KN (C.D. Cal.) and *United States ex rel. Boisvert v. FMC Corp.*, No. C-86-20613, 1987 U.S. Dist. LEXIS 13549 (N.D. Cal. Sept. 8, 1987)); or (b) the government acquired the information before the 1986 amendments were enacted, but the relator filed the complaint *after* they were enacted (as in *Newsham* and *Schumer*). In either situation, the amendment changes the consequences of pre-amendment events. Accordingly, the amended FCA's public disclosure provision which repealed

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4/ *Cf. United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 814 (9th Cir. 1995) (finding that "the proper focus of retroactivity analysis is the conduct that would be affected by the law" and stating, in *dicta*, that the amendment to the government knowledge bar in the FCA could not be applied retrospectively in a case where the relator disclosed the information to the government prior to 1986), *cert. denied*, 116 S. Ct. 700 (1996).

the government knowledge bar cannot be applied to actions based on information the government possessed prior to its enactment.

The application of the public disclosure provision to facts such as those presented in *Schumer* would, like retroactive application of an expanded statute of limitations, revive a previously barred claim. Yet, this Court has refused to apply a new statute of limitations where it would bar an otherwise viable claim or revive a previously barred claim. *See, e.g., United States v. St. Louis, S.F. & T.R.. Co.*, 270 U.S. 1, 3 (1926) (refusing to apply a three-year statute of limitations retroactively to bar a claim because such construction is not required by the explicit language of the statute or by necessary implication);[5/] *Fullerton-Krueger Lumber Co. v. Northern Pac. Ry. Co.*, 266 U.S. 435, 437 (1925) (holding that a new law that would toll the statute of limitations could not be applied so as to revive stale claims). Hence, this rationale leads to the obvious conclusion that the public disclosure provision cannot be applied retroactively.

C. The Repeal Of The "Government Knowledge" Bar Increases Contractors' Liability And Imposes Additional Duties.

The Ninth Circuit found that, because the public disclosure provision "'did not alter [the contractor's] underlying liability; it only altered the conditions under which a *qui tam* relator can bring an action to enforce that liability'" it could be applied retroactively to Schumer's action. Pet. App. at 7a (quoting *Lindenthal*, 61 F.3d at 1408). However, this Court's rule against the retroactive

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5/ *St. Louis* was cited in *Landgraf* for the proposition that a statute should not be applied retroactively absent explicit language or a clear purpose requiring such application, indicating the continued vitality of the case. *Landgraf*, 114 S. Ct. at 1501 n.27.

application of new laws is not limited to statutes that alter the legality of prior conduct. In fact, in *Landgraf*, this Court refused to apply a new compensatory damages provision retroactively even though "it [did] not make unlawful conduct that was lawful when it occurred." 114 S. Ct. at 1506. The Court noted that the damages provision would impose "a 'new disability' in respect to past events." *Id.* at 1506-07 (citation omitted). Similarly, the public disclosure provision would, if applied to conduct occurring before its enactment, impose additional duties on contractors.

A statute that confers rights on a new class of plaintiffs cannot be applied retroactively because it imposes new obligations on defendants. *See Winfree v. Northern Pacific Railway Co.*, 227 U.S. 296 (1913) (cited with approval in *Landgraf*, 114 S. Ct. at 1507). In that case, an accident resulting in the death of a minor occurred at a time when the law allowed a wrongful death action only by the father and only in state court. Congress subsequently passed a law which enabled the administrator of the estate to bring a wrongful death cause of action in federal court. Had the statute merely permitted the father to move from state to federal court, it would have been indistinguishable from jurisdictional statutes that determine the appropriate tribunal for an action, and therefore, retroactive application might have been appropriate. However, extending the cause of action to a new class of plaintiffs (the administrator of the estate), "permitted recovery in cases where recovery could not be had before and [took] away the defendant's defenses which formerly were available." 227 U.S. at 302. Because there existed no cause of action for the administrator at the time the accident occurred, this Court held that the statute could not be applied retroactively to give the administrator a right of action. *Id.*

The concerns expressed by the *Winfree* Court are more significant in cases brought pursuant to the FCA, given the reality that many contractors would not have been sued if the relators' action had been barred under the pre-1986 FCA. For example, in *Newsham*, the government, through

its contracting officers, determined that no claim against the contractor was appropriate. *See* App. at 4a-5a.[6/] Thus, permitting relators to bring actions that could not have been brought under the pre-1986 FCA increases contractors' liability by forcing them to defend these actions.

This is especially troublesome because *qui tam* actions declined by the government but pursued by relators are nearly always without merit.[7/] Thus, the contractor's liability is increased for benign acts. The scenario of a *qui tam* relator purporting to "stand in the government's shoes" while asserting a position completely at odds with the government's own position is, regrettably, not uncommon. *See, e.g., Lindenthal*, 61 F.3d at 1411-12 (relator's contention about the quality of engineering drawings which defendant sold to the Air Force was undercut by the government's testimony that the drawings were compliant with the contract and did not give rise to any false claims); *United States ex rel. Haycock v. Hughes Aircraft Company*, Nos. 94-55620, 94-55826, 1996 U.S. App. LEXIS 27664 (9th Cir. Oct. 21, 1996) (Unpublished decision, reprinted at App. 18a-21a) (affirming summary judgment in a *qui tam* action that was based on accounting practices that were known to and approved by the government).

6/ Like the amended FCA which assigned the government's rights to relators, the statute in *Winfree* modified who may bring an action by assigning claims to the administrator of the estate. An "assignment" is particularly anomalous in *Newsham* where the primary holder of the right to sue for any alleged false claims, the government, determined that there was no basis on which to bring such an action.

7/ From FY 1987 through FY 1995, recoveries had occurred in only 31 of the 672 cases in which the government declined intervention; the $15.6 million recovered in these 31 cases is less than 1% of the government's total recoveries under the FCA. Statistics, *supra*, n.1.

The government knowledge bar in the pre-1986 FCA provided an automatic bar to cases like *Lindenthal, Newsham, Schumer, Boisvert and Hyatt* that are based on information that the government possessed before the case was filed. Under the 1986 amendments, in the absence of a public disclosure, those kinds of cases cannot be disposed of until the summary judgment stage or after trial.[8/] Consequently, application of the public disclosure provision to pre-enactment conduct imposes substantial costs and other burdens on contractors.

Furthermore, the realities of *qui tam* litigation show that permitting a relator to sue in place of the government is, itself, a new liability. Actions by relators impose several duties, obligations and increased costs on contractors.

First, because a relator has only a single option for attempting to resolve the matter -- litigation under the FCA -- he forecloses the contractor's opportunity to resolve the matter through other means available to the government. The government has a variety of enforcement mechanisms. For example, it may bring a contract action (*see* 41 U.S.C. §§ 601-613), make cost disallowances (48 C.F.R. 52.242-1), withhold payment (48 C.F.R. 32.611-2), suspend the contractor (48 C.F.R. 9.407), or bring an FCA action. In a matter pursued by the government, the contractor faces an "opponent" with discretion and flexibility to resolve the matter in a more fair, appropriate and expeditious manner.

8/ This fact is highlighted by the Ninth Circuit's decision in *Lindenthal*. Although the government knew of the information forming the basis of the relators' claim prior to 1986, the district court and the Ninth Circuit applied the amended provision to those claims and allowed the action to proceed. *Lindenthal*, 61 F.3d at 1407-1408. It was not until after the expenditure of a great deal of time and money on discovery, a lengthy bench trial, and an appeal that General Dynamics prevailed on the merits. *See id.* at 1405-1406, 1410-1412.

Second, a relator's quest for a bounty of up to 30% of the government's recovery (§ 3730(d)(1)) gives rise to a conflict of interest between appropriate enforcement of the law and maximizing personal gain. In the course of settlement discussions, the relator's bounty demands can result in delay in the ultimate resolution of the case because of disputes he may have with the government over the division of proceeds.[9/] The relator's bounty demands may also effectively compel the contractor to pay a higher amount to settle the case than would have been demanded by the government if the government had brought the case alone. Alternatively, the contractor may be compelled to undertake the expense and risk of litigating a *qui tam* case that may otherwise have been settled by the government.

Third, relators increase a contractor's potential liability because contractors may be held liable (under § 3730(d)) for relator's attorneys' fees, but not the government's.[10/]

9/ A relator's bounty demand may be an effort to obtain more than a fair share of the government's proceeds, thereby delaying the ultimate resolution of the matter. *See, e.g., United States ex rel. Killingsworth v. Northrop*, 25 F.3d 715 (9th Cir. 1994), *cert. denied*, 117 S. Ct. 296 (1996) (the government, upon assertion that the relator had unfairly allocated settlement proceeds to his personal claim and away from the government, was entitled to a hearing to challenge the settlement).

10/ Lockheed Martin submits that the attorneys' fees provision, which did not exist prior to the 1986 amendments, cannot be applied retroactively. Unlike the situation in *Bradley v. School Board City of Richmond*, 416 U.S. 696 (1974), attorneys' fees were not available in FCA actions prior to the enactment of the 1986 amendments. Nevertheless, at least one court has ruled that the attorneys' fee provision applies to a case based on pre-amendment conduct where the fees were incurred after its enactment. *See Newsham*, 907 F. Supp. at 1360-1361.

Fourth, relators make it more difficult to obtain discovery. Contractors cannot obtain written discovery from the government when it declines to intervene because, even though the government may be the real party in interest, it is not a party to the action. Contractors must resort to the more limited discovery procedures available against non-parties when they seek what is often the most crucial discovery in the case -- information from the government showing the validity of the questioned conduct.

In sum, *qui tam* actions pose financial and other burdens and risks which are distinct from those faced when the government pursues enforcement efforts on its own. The Ninth Circuit was wrong in concluding that the public disclosure provision could be applied to Schumer's action. *See* Pet. App. at 7a. For the reasons stated above, the repeal of the government knowledge bar "attaches new legal consequences to events completed before its enactment," *Landgraf*, 114 S. Ct. at 1499, "impose[s] new duties with respect to transactions already completed," and "increase[s] a [contractor]'s liability for past conduct." *Id.* at 1505. Consequently, the public disclosure provision cannot be applied retroactively.

II. THE NINTH CIRCUIT'S DEFINITION OF "PUBLIC DISCLOSURE" IS INCONSISTENT WITH THE LANGUAGE OF THE AMENDED FCA AND WITH CONGRESS' INTENT TO BAR PARASITIC ACTIONS.

Even assuming that the public disclosure provision applies retroactively, Schumer's action is barred. Construed in accordance with its plain language, the provision barring a *qui tam* action that is "based upon the public disclosure of allegations or transactions in a[n] . . . administrative . . . audit or investigation," bars this case where the government conducted an audit and investigation and disclosed the matter to members of the public who were unaware of the alleged wrongdoing. To the extent that the ordinary meaning of these terms cannot be derived within the statutory context, the Court may rely on congressional intent as reflected in the FCA's legislative history.

The Ninth Circuit held that the government's disclosures to Hughes and Northrop -- even to individuals not engaged in or aware of the alleged wrongdoing -- should not be considered "public" disclosures. The court, believing without foundation that defense contractors and the government "operate within a closed loop of secrecy" and in a "private sphere," exempted defense contractor employees from being considered members of the public. Pet. App. at 9a. This exemption is neither expressed nor implied in the statute. Further, it conflicts with the legislative purpose of barring *qui tam* actions that duplicate and interfere with actual enforcement efforts already undertaken by the government.

A. The 1986 Amendment Preserved The Bar Against Parasitic *Qui Tam* Actions While Maintaining The Government's Exclusive Right Of Enforcement In Certain Circumstances.

The pre-1986 government knowledge bar afforded the government complete deference to determine: (a) how to act upon information in its possession, including whether to proceed in a criminal, civil or administrative forum; (b) when to act, or (c) whether to act at all. Unless the relator filed his *qui tam* action prior to the government learning of the alleged wrongdoing, his action was barred.

The 1986 amendment reduced to some extent the deference afforded the government concerning FCA enforcement and expanded the opportunities for *qui tam* enforcement. Congress attempted "to strike a balance between encouraging private citizens to expose fraud and avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud." *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992).

Congress believed that, too often, the government failed to take *any* action on information in its possession.

> [T]he Committee is concerned that there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action.

H.R. Rep. No. 660, 99th Cong., 2d Sess. 22-23 (1986).

> We must prevent suits from being dismissed simply by the Government's assertion that the Government already had the information brought forward by the plaintiff in order to ensure that the Government is indeed acting on that information.11/

Weighing these concerns, Congress repealed the government knowledge bar and replaced it with a rule that bars *qui tam* actions "based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media unless the action is brought by the Attorney General or the person bringing the

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11/ *False Claims Act Amendments, 1986: Hearings Before the Subcomm. on Admin. Law and Government Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 95, (1986) (statement of Rep. Berman). *See also* 132 Cong. Rec. H6483 (daily ed. Sept. 9, 1986) (statement of Rep. Bedell) ("there may be many cases where evidence is somewhere in the hands of some Government official, even if the Government does not have the evidence in organized form or even knows it has the information"). Congress also believed that inaction often was due to the government's "judgment that devoting scarce resources to a questionable case may not be efficient." S. Rep. No. 345, 99th Cong., 2d Sess. 7, reprinted in 1986 U.S.C.C.A.N. 5266, 5272 (hereafter "Senate Report"). This concern has proved to be unfounded, as less than 1% of the money recovered under the FCA since 1986 has come from cases declined by the government and prosecuted by *qui tam* relators. Statistics, *supra*, at n.1.

action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A).

The amended provision preserves, in certain circumstances, the government's exclusive enforcement authority and unfettered right to decide how or whether to enforce the law. The question presented by the amended provision is: What event must occur in order for the government to maintain its exclusive right of enforcement? Because neither the statute nor the legislative history defines the term "public disclosure," there has emerged a range of interpretations:

- Two circuits have held that a public disclosure occurs whenever the government undertakes one of the enumerated enforcement efforts in a manner that is visible (or "disclosed") to someone outside the government who had no prior knowledge of the matter.12/

- Another circuit, which recognized the difficulty of determining whether information was actually disseminated, held that a public disclosure occurs when the information is "available" or "potentially accessible" to a member of the public with no previous knowledge.13/

- The statute can be reasonably interpreted as barring *qui tam* enforcement whenever information about wrongdoing is disclosed outside the private group of alleged wrongdoers (*i.e.*, "publicly") *to* the government during the course of a government audit or investigation. In that regard, the "public" disclosure is the disclosure of

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12/ *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992) (disclosure of subject matter of investigation); *United States ex rel. Fine v. MK-Ferguson Co.*, Nos. 95-2011, 95-2021, 1996 WL 638479 (10th Cir. Nov. 6, 1996) (disclosure of audit report).

13/ *United States ex rel Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1157-60 (3d Cir. 1991).

information beyond the confines of the wrongdoer *to* the government rather than *by* the government. The bar would be applied, however, only when the government acted on that information by commencing an audit, investigation or one of the other enumerated enforcement mechanisms.

The decision below is inconsistent with other rulings, with the statutory language and with Congress' intent.

B. A "Public Disclosure" Occurs When The Government Discloses Its Audit Report To Anyone Outside The Government, Including Employees Of The Audited Contractor Who Were Unaware Of The Alleged Wrongdoing.

1. The Ninth Circuit's Exemption Of Defense Contractor Employees From Being Considered Members Of The Public Is Unfounded.

The Ninth Circuit held below that the government's disclosure of its audit report to employees of the audited contractor who were not involved in the alleged fraud (termed "innocent employees"), did not qualify as a public disclosure. Pet. App. at 8a-11a (disagreeing with the Second Circuit's holding in *Doe*, 960 F.2d at 323).14/ The

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14/ In *Doe*, the Second Circuit held that public disclosure occurs when the government, in the course of an investigation, discloses the subject matter to members of the public with no prior knowledge thereof -- in that case, employees of the targeted company who did not participate in the alleged fraud but whom the government interviewed in connection with its investigation. 960 F.2d at 319-20. In *United States ex rel. Fine v. MK-Ferguson Co.*, Nos. 95-2011, 95-2021, 1996 WL 638479 (10th Cir. Nov. 6, 1996), the U.S. Department of Energy's disclosure to the government of Oregon of a federal audit containing allegations about a contractor located in Oregon was held to be a public disclosure even though the state did not further disseminate the audit.

court believed it was unrealistic to consider these individuals to be members of the public. Pet. App. at 9a. This belief was premised upon a set of erroneous assumptions about the motivations of defense contractor employees and their relationship with the government's oversight personnel. The record contained not one iota of evidence to support these sweeping conclusions.

The first faulty assumption was that employees of defense contractors are uniquely inclined to suppress fraud.

> Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure.

Id. The court further commented:

> [I]n the context of defense procurement, security considerations generally require that the government, contractors and subcontractors operate within a closed loop of secrecy.

Id. Thus, the court held that the government's release of information to a defense contractor is a disclosure "within a private sphere." *Id.* at 9a-10a.

The FCA does not expressly or impliedly exempt defense contractor employees (or any other kinds of employees) from status as members of the public; nor does it identify certain forms of disclosure as "private."15/

15/ One could infer from the ruling that a disclosure of a government audit to a business not engaged in defense contracting would constitute a public disclosure. It is improper to single out "defense" contractors for greater exposure to *qui tam* actions. "[C]ourts are not at liberty to create an exception where Congress has declined to do so." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 873 (1991).

Congress expressly identified a government audit as one vehicle for the occurrence of a public disclosure. § 3730(e)(4)(A). Congress must have been aware of the fact that such audits are routinely disclosed by the government to the audited contractor (and to the prime contractor when the audited company is a subcontractor).

The Defense Contract Audit Agency ("DCAA"), which conducted several of the audits that preceded the filing of Schumer's *qui tam* action (as well as the audits which preceded the *Newsham* action against Lockheed Martin), "routinely provides copies of draft reports for all audits . . . to the contractor being audited for review and comment." DCAA Audit Manual § 10-212.2 (1996).16/ Apart from such disclosures, the government does not publish its audit reports, mail them to reporters or other industry observers, place them in the Congressional Record, or file them in libraries or courthouses. Accordingly, the Ninth Circuit strains the meaning of the statute by creating an exception to the term "public disclosure" which, in turn, exempts the most common way that government audits are disclosed outside the government, *i.e.*, by sending such audit reports to the subject company.

Furthermore, the court's assumptions about contractor employees and government oversight personnel being part of a "closed loop of secrecy" are unfounded. There is nothing peculiar about government contracting that fosters keeping illegal conduct secret. The Ninth Circuit's treatment of contractor employees disregards the key role that Congress carved out for those individuals in its enforcement scheme. Congress believed that in situations

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16/ While the Audit Manual in effect in 1986 does not state that such disclosures are "routine," it notes that disclosure is subject to the contracting officer's approval. § 10-213.3 (1983). In both *Schumer* and *Newsham*, DCAA disclosed its audit reports to the contractors.

in which allegations of wrongdoing by a company remained undisclosed and unaddressed by the government, an employee of that company with knowledge of the wrongdoing would step forward to enforce the law.17/

Had Congress shared the court's distrust of contractor employees, it would have enacted a vastly different statute. *Doe*'s holding that *qui tam* enforcement is barred when the wrongdoing is disclosed by the government to "innocent employees" who were "strangers to the fraud" implements the core rationale of the *qui tam* provisions and the bar against parasitic actions. The Ninth Circuit, by adopting a rule not contained within the text of the statute, ultimately second-guesses and overrides Congress' rationale.

2. The Ninth Circuit Misinterpreted The Purpose Of The 1986 Amendment.

The Ninth Circuit overlooked the legislative history described above which shows that Congress repealed the government knowledge bar in 1986 because it was concerned about the government possessing information but taking no action, *i.e.*, conducting no investigation and taking no enforcement steps whatsoever. Had the court correctly assessed Congress' intent, it would have found that the government's actions in this case justified barring the *qui tam* action.

The Ninth Circuit stated that *Doe*'s holding:

17/ *See* Senate Report at 5269 ("Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity"). Thus, Congress presumed that most *qui tam* actions would be filed by contractors' employees as, in fact, they have been. *United States ex rel. Fine v. Chevron*, 72 F.3d 740, 742 (9th Cir. 1995) (*en banc*) (noting that employee cases are the "paradigm *qui tam* case").

> drastically curtails the ability of insiders to bring suit once the government becomes involved in the matter. . . . Contrary to Congress' intentions for the jurisdictional bar, the *Doe* rule "effectively shifts the standard from 'public disclosure' back to 'government investigation,'" so that government possession of information relating to fraud effectively forecloses *qui tam* suits.

Pet. App. at 10a (citing the dissent in *Doe*, 960 F.2d at 326).

The pre-1986 FCA barred *qui tam* enforcement on the basis of "government knowledge." Thus, the Ninth Circuit overlooked the fact that, under the pre-1986 law, *qui tam* actions were barred well before the government commenced an "investigation," or otherwise became "involved in the matter." There is a vast difference between: (a) government knowledge with no investigation, and (b) government knowledge coupled with an investigation. The legislative history suggests that Congress intended to move the bar from (a) to (b). The congressional statements quoted above strongly suggest that if the pre-1986 FCA had ensured that the government actually conduct an investigation or an audit before a *qui tam* action could be barred, Congress would have been satisfied with such government efforts and would not have expanded *qui tam* enforcement.

Thus, the Ninth Circuit's statement that the *Doe* case bars *qui tam* enforcement upon the government's commencement and disclosure of its investigation is correct. However, the Ninth Circuit is wrong to equate such enforcement with what Congress perceived in 1986 to be complete inaction.

The enforcement efforts undertaken here by the government are far from inaction, and the disclosures

between the government and the contractors did not occur within a "closed loop of secrecy."18/ Indeed, the events described in the record portray the government's efforts as a model of efficient dispute resolution. The disclosures of information between the interested parties during the course of the investigation and resulting from the government's withholding of payment, enabled Hughes to demonstrate to the government and to Northrop that the cost charging practices in question not only were proper but actually saved the government money. J.A. at 136. This process enabled the government to avoid costly and time-consuming litigation.

Unfortunately, however, much of the efficiency gained by such resolution was lost to Hughes. Notwithstanding the government's favorable determination, Hughes still had to litigate the same matter against an individual who, purporting to stand in the government's shoes, asserted that the government had been defrauded. Because, in *Schumer*, the government exercised enforcement and disclosed its actions outside the government, *qui tam* enforcement is barred.

18/ The record reflects that, upon the request of Northrop (J.A. at 20), a lengthy investigation and audit process was undertaken, involving scores of people from Hughes, Northrop and the government, each of whom disclosed and received information about the allegations and transactions. Government personnel who participated in this dialogue and disclosure of information (and who routinely participate in such matters) included those responsible for awarding and supervising the contracts, administering and monitoring the costs charged on the contracts, auditing and investigating the contractor's business practices, and determining what enforcement actions were appropriate. The latter category of government personnel included the Administrative Contracting Officer, who initially withheld payment of costs (J.A. at 45-47), and the Defense Procurement Fraud Unit of the Department of Justice, which had prosecutorial discretion (J.A. at 31).

C. A "Public Disclosure" Occurs When Allegations Disclosed To The Government Result In A Government Audit Or Investigation.

The Ninth Circuit's fear that disclosure of government audits to company employees would "not trigger the potential for corrective action presented by other forms of disclosure" (Pet. App. at 9a) is misplaced. Section 3730(e)(4) and its history suggest that the government's actual audit or investigation of allegations disclosed to the government is sufficient corrective action to bar *qui tam* enforcement. Under the statutory scheme, the Court can properly apply a *per se* rule that whenever allegations are disclosed to the government, and, as a result, the government commences an audit or investigation of allegations, no one other than the "original source" of the allegations may bring a *qui tam* action.

Such a *per se* rule can be derived from the decisions of courts which have held that a public disclosure occurs when information is "available" or "potentially accessible" to the public even if no one has actually sought to obtain the document. *See, e.g., United States ex rel. Kreindler et al. v. United Technologies Corp.*, 985 F.2d 1148, 1158 (2d Cir.), *cert. denied*, 113 S. Ct. 2962 (1993) (information obtained by an attorney from an opposing party during discovery in a prior non-related civil action "was publicly disclosed because it was available to anyone who wished to consult the court file"); *United States ex rel. Stinson v. Prudential*, 944 F.2d at 1157-60 (same result on similar facts even though the information obtained in discovery was not filed in the courthouse). A government audit or investigation certainly triggers a greater potential for enforcement than a disclosure in a non-governmental civil "hearing" (properly defined as any civil proceeding) -- which is another form of disclosure enumerated in § 3730(e)(4)(A).

Government audit reports are routinely available to members of the public through the Freedom of Information Act ("FOIA").[19] Therefore, if a public disclosure occurs when information is potentially accessible, then an audit can be deemed a public disclosure once it has been prepared by the government.[20] This *per se* rule is consistent with Congress' desire to limit *qui tam* actions when the government has already undertaken actual enforcement.

A *per se* rule barring *qui tam* actions based on government audits can also be derived from an examination of the text of the provision. Section 3730(e)(4) does not expressly require *the government's* disclosure of its audit report outside the government. Rather, the "public disclosure of allegations or transactions in a[n] . . . audit" can be read entirely consistently with the statute to apply to allegations that are disclosed outside the "private" group of wrongdoers when such disclosure leads to a government audit or investigation. "Public," as commonly used, is contrasted with the "private" group of wrongdoers. *See* Webster's Ninth New Collegiate Dictionary 952 (Merriam-Webster 1991) ("public" defined as "of or relating to business or community interests as opposed to private affairs"). "Disclosure" is defined in Black's Law Dictionary

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19/ 5 U.S.C. § 552. The DCAA's FOIA regulations state an intent to "[p]romote public trust by making the maximum amount of information available to the public, upon request, pertaining to the operation and activities of the Agency." 32 C.F.R. § 290.4.

20/ The court below held that an audit report is publicly disclosed under FOIA only when it is actually requested and released. Pet. App. at 13a. The presumption that DCAA audit reports are accessible to the public held true in this case; Schumer successfully obtained each of the audits by submitting a FOIA request, though not until after he filed his *qui tam* action. *Id.*

464 (6th ed. 1990) as "[t]o bring into view by uncovering; to expose; to make known . . . to free from secrecy or ignorance . . . ." Thus, when information is disclosed outside the private group of wrongdoers, there has been a public disclosure. When that public disclosure leads to a government audit or investigation, the desired enforcement mechanisms of the FCA are triggered.

"A 'whistleblower' sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a 'conspiracy of silence,' not their mimics." *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992). The disclosure of information to the government about wrongdoing is what sounds the alarm. Such disclosures occur when employees call the Department of Defense's "hotline" and through DoD's Voluntary Disclosure Program which encourages contractors, through a possible reduction in sanctions, to disclose their wrongdoing to the government. Once a voluntary disclosure is initiated, the government commences an investigation and decides on appropriate enforcement measures, including, specifically, whether to bring a civil FCA action.21/ As currently interpreted by most circuits, § 3730(e)(4)(A) would permit a *qui tam* action by an employee whose information was obtained solely from the company's voluntary disclosure -- a result which severely impedes the goals of this program.

21/ *See Department of Defense Voluntary Disclosure Program, A Description of the Process*, (DoD Inspector General April 1990) (reprinted in App. at 20a-43a), App. at 29a (describing the purpose of the program), App. at 40a ("Following receipt of the contractor's internal report, the designated [investigative organization(s)] begins the verification process. The verification audit and investigation are given sufficiently high priority to allow for its expedited completion").

This absurd result would not occur if the above statutory construction were applied.22/ Under this construction, as soon as the government responds to such a disclosure by commencing an audit or investigation, the FCA bars a *qui tam* action by anyone other than the "original source" of the disclosure. If, on the other hand, the government fails to take any responsive action, and none of the other forms of public disclosure occur, then anyone may bring a *qui tam* action.

The government, in at least one case, has asserted a similar view:

> The section-by-section analysis [of the legislative history] does not distinguish between information in the possession of the government that has been released to the public at large, and government information that has been obtained in another manner. The information upon which this case was based was not only *developed by* the government, but also the government had an open investigation of the facts alleged in the complaint at the time the suit was brought. Under the statutory language and the section-by-section analysis, this action is barred because it is based solely upon information *developed by* and available to the government.23/

22/ *See* Ryland, *The Government Contractor's Dilemma: Voluntary Disclosure as the Source of Qui Tam Litigation*, 22 Pub.Cont.L.J. 764, 800-802 (1993) (the Voluntary Disclosure Program "clearly should qualify as an "administrative investigation;" "information submitted by the contractor has actually been disclosed to 'strangers to the fraud'").

23/ Brief for the United States, *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991) (emphasis added), attached to Hughes' Supplemental Brief On Petition for Writ (filed Sept. 25, 1996), App. B, at 24a.

Information "developed by" the government is essentially the same as information "disclosed to" the government. Thus, the government asserted the position that a *qui tam* relator who merely mimics what has already been disclosed to and investigated by the government adds nothing to the enforcement scheme and should be barred from maintaining a *qui tam* action.

There is no basis for applying the bar only when the government discloses the allegations outside the government. This misplaced focus stems, in part, from cases in which the government argued that a government employee could not be a relator because his suit was based upon allegations which he disclosed outside the government to himself as a member of the public.[24/] Also, while *Doe* considered how far the allegations contained in the government's investigation must seep into the "public domain," the court never considered whether the underlying disclosure of allegations *to* the government could have been the public disclosure. 960 F.2d at 322. Thus, courts have simply assumed that "public disclosure" in this context means "government disclosure," and they have overlooked the plain language of the text.

It is not apparent that Congress believed FCA enforcement would be enhanced merely by the government informing one or more members of the public about its efforts. Congress was chiefly concerned that the government take action, not necessarily disseminate information to the public about its action. A ruling which bars *qui tam* actions (other than by original sources) when allegations are disclosed *to* the government which actually result in the government commencing an audit or investigation, would be consistent with the language and

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24/ *See, e.g., United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991).

purpose of § 3730(e)(4)(A), and would provide a necessary bright line for determining when a *qui tam* action may be brought. The FCA, with its potential for treble damages and penalties (§ 3729(a)), justifies the application of bright line rules.

CONCLUSION

For the foregoing reasons, Lockheed Martin urges the Court to reverse the Ninth Circuit on the questions presented by the Petitioner.

Respectfully submitted,

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APPENDICES

APPENDIX A

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel. MARGARET A. NEWSHAM and MARTIN OVERBEEKBLOEM, Plaintiff v. LOCKHEED MISSILES AND SPACE COMPANY, INC. Defendant.	Civil Act. No. C88-20009 RPA **MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE**

I. INTRODUCTION

This action was brought against Lockheed Missiles and Space Co., Inc. on January 22, 1988, on behalf of the United States of America by two private citizens under the qui tam provisions of the False Claims Act, 31 U.S.C. § 3730(b) et seq.[1/] The private citizens, known as relators, complain of fraudulent conduct they witnessed or learned about while they were employed by Lockheed. One of the relators, Margaret Newsham, makes various allegations of labor mischarging connected with one or two specific government contracts, which will be identified herein as P285 and P377.

Pursuant to 31 U.S.C. §3730(b)(4)(B), on February 3, 1989, the United States notified the court of its election to decline to intervene in this matter, leaving the prosecution of this case to the relators.

Defendant Lockheed has filed a motion to dismiss that portion of the complaint applying to Mrs. Newsham's allegations, on the ground that the court lacks jurisdiction over the subject matter of the action. Lockheed contends that the court's jurisdiction in this case should be governed by the law in existence at the time Mrs. Newsham first informed the Government of her allegations. At that time the False Claims Act contained a jurisdictional bar to actions brought by relators where it was made to appear that the action was based on information and evidence known to the Government at the time the complaint was filed.

On the other hand, Mrs. Newsham argues that her standing or capacity to bring a qui tam action in 1988 should be governed by amendments to the False Claims

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1/ "Qui tam" is from the Latin phrase, "Qui tam pro domino rege quam pro sic ipso in hoc parte sequitur" -- "Who as well for the King as for himself sues in this matter."

Act in 1986, by which Congress eliminated the jurisdictional bar under prior law, and allowed "honest informers" with direct knowledge of the fraud, who first reported the information to the Government, to bring suit, notwithstanding the Government's knowledge.

The United States has an obvious interest in the proper interpretation of the False Claims Act. Many False Claims Act suits are initiated by the Attorney General. Still others, although initially filed by relators under the Act's qui tam provisions, are taken over by the Attorney General. Even where the Attorney General does not take over a qui tam case, the United States is still the principal statutory beneficiary. Because resolution of the issue presented to this Court relates to the proper interpretation of the False Claims Act and could effect the interests of the Government, the United States files this amicus brief.

As demonstrated below, the relator's capacity or standing to bring this action should be governed by the law in existence at the time the suit was filed. By the 1986 amendments to the False Claims Act, Congress specifically intended to allow relators such as Mrs. Newsham to bring suit and not be barred by the prior law's jurisdictional bar. Those amendments generally apply to suits pending in Court after the date of the amendments. Application of the 1986 amendments to this action is not manifestly unjust. The prior jurisdictional bar was never a bar to liability of the defendant; it was only a device to protect the Government from "parasitical suits" brought by know-nothing informers. The Government could still have brought an action based on the relator's information. Congress's decision in 1986, about who should be allowed to prosecute the Government's fraud claims, after the Government has an opportunity to investigate and consider the matter on its own, does not infringe on any matured or unconditional right Lockheed possesses.

II. FACTS

In the complaint Mrs. Newsham alleges:

1. Employees awaiting security clearances to work on project P285 and other projects were placed in separate areas known as "ice boxes." Mrs. Newsham alleges that ice box employees were under utilized, were given little or no work to perform and constantly were idle or engaged in personal business, but were instructed by their supervisors to charge time to government projects for a full work week.

2. Both ice box employees and regular Lockheed employees with security clearances engaged in personal activities during working hours, while charging their time to government projects. One result of this activity was to increase overtime charges by the regular Lockheed employees.

3. Lockheed awarded numerous sole source subcontracts to Intercon Systems Corporation for employees holding United States Government top secret security clearances without adequate justification and at unreasonable cost to the Government. She alleges that this special treatment was the result of a personal relationship between Lockheed's P285 manager and Intercon's director of personnel.

4. Labor hours were charged to P285 for time spent transferring computer documentation onto P285 computers from a different type computer system for a different government project.

5. On instructions from their supervisors, Lockheed employees shifted their labor hours from P285 to P377 because P285 had exhausted or nearly exhausted its budget.

It is undisputed that in August, 1984 Mrs. Newsham informed the Government, through the Defense Contact Audit Agency (DCAA) Hotline of the same allegations that she ultimately pleaded in her complaint. DCAA conducted separate audits of each of her allegations, except that

involving the mischarging between P285 and P377. DCAA's audit reports were reviewed by the appropriate government contracting officers, who discussed the findings with Lockheed. In the end, the contracting officers determined that no claim against Lockheed was appropriate on any of the audit reports.

III. ARGUMENT

1. The Law At The Time Mrs. Newsham Informed The Government

At the time Mrs. Newsham made her hotline complaint to the DCAA in 1984, the False Claims Act, 31 U.S.C. § 3730(b)(4) provided[2/]:

> Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

The language of the statute in force at the time made it clear that a court had no jurisdiction over an action brought by a relator at any time it was made to appear that the suit

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2/ In 1982, title 31 of the United States Code, including the provisions of the False Claims Act, was enacted into positive law. The False Claims Act, which was formerly found at 31 U.S.C. 231-235, was re-codified at 31 U.S.C. 3729-3731. Although some sections of the Act were shifted from their prior positions, and simple language was substituted for awkward and obsolete terms, Congress intended that the re-codification make no substantive change in the law. See, H.R. Rep. No. 97-651, 97th Cong., 2nd Sess. 3, reprinted in 1982 U.S. Code Cong & Ad News 1897.

was brought based on evidence or information known to the Government on the date the relator brought her action.3/

While the jurisdictional question turned on whether the suit was based on information in the hands of the Government at the time the suit was brought, the Courts ruled that it was not necessary that the Government's knowledge be the exact equivalent of that provided by the relator. See e.g., United States ex rel. Greenberg v. Burmah Oil Co., 558 F.2d 43 (2d Cir.), cert. denied 434 U.S. 967 (1977). The evidence possessed by the United States did not have to be the "mirror image" of the information in the hands of the relator. United States ex rel. Joseph v. Cannon, 642 F.2d 1373, 1377 (D.C. Cir. 1981), cert. denied 455 U.S. 999 (1982); United States ex rel. Weinberger v. Florida, 615 F.2d 1370, 1371 (5th Cir. 1980).

Rather, as stated by the Court in Pettis ex rel. United States v. Morrison-Knudson Co., 577 F.2d 668, (9th Cir. 1978), all that was necessary to invoke the jurisdictional bar was that:

> the evidence and information in possession of the United States at the time the False Claims Act suit was brought was sufficient to enable it to adequately investigate the case and to make a decision whether to prosecute.

577 F.2d at 674.4/

3/ However, because the Government could cure the jurisdictional defect by taking over the action from the relator within sixty days after the action was filed, the Court's jurisdiction had been referred to as "conditional" in such circumstances. United States ex rel. Sacks v. Philadelphia Health Management Corporation, 519 F. Supp. 818, 822 (E.D. Pa. 1981); United States ex rel. Shinn v. State of Tennessee, 74 F. Supp. 635 (E.D. Tenn. 1947); United States ex rel. Bayarsky v. Brooks, 110 F. Supp. 175 (D.N.J. 1953).

The source of the Government's prior knowledge could range from prior formal State government investigations communicated to Federal officials, as in United States ex rel. Wisconsin v. Dean, supra and United States ex rel. McFarlane v. Hutchinson, 519 F. Supp. 563 (D. Co. 1981), to newspaper articles, as in United States ex rel. Wisconsin v. Dean, supra; United States ex rel. Greenberg v. Burmah Oil Co., supra; and United States ex rel. Thompson v. Hays, supra.

Moreover, recognizing Congress's refusal in 1943 to adopt a specific provision to the contrary, Courts ruled that the jurisdictional bar applied, even if the relator was the original source of the information in the Government's hands at the time the suit was brought. Safir v. Blackwell, supra; Pettis ex rel. United States v. Morrison-Knudson Co., supra; United States ex rel. Aloff v. Aster, 176 F. Supp. 208 (E.D. Pa. 1959), aff'd, 275 F.2d 281 (3rd Cir.),

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(Footnote cont'd from previous page.)

4/ See also, United States ex rel. Joseph v. Cannon, 642 F.2d 1373 (D.C. Cir. 1981); United States ex rel. State of Wisconsin v. Dean, 629 F.2d 1102 (7th Cir. 1980); United States ex rel. Weinberger v. State of Florida, 615 F.2d 1370 (5th Cir. 1980); Safir v. Blackwell, 579 F.2d 742 (2nd Cir. 1978); United States ex rel. Weiss v. Schwartz, 546 F. Supp. 422 (N.D. Cal. 1982); United States ex rel. McFarlane v. Hutchinson, 519 F. Supp. 563 (D. Colo. 1981); United States ex rel. Sacks v. Philadelphia Health Management Corp., supra; United States ex rel. Lapin v. International Business Machines Corp., 490 F. Supp. 244 (D. Hawaii 1980). Cf. United States ex rel. Greenberg v. Burmah Oil Co., Ltd., 558 F.2d 43 (2nd Cir. 1977); United States ex rel. Aloff v. Aster, 275 F.2d 281 (3rd Cir. 1960); United States ex rel. Leslie v. Potomac Electric Power Co., 208 F.2d 39 (D.C. Cir. 1953); United States v. Rippetoe, 178 F.2d 735 (4th Cir. 1949); United States ex rel. Thompson v. Hays, 432 F. Supp. 253 (D.D.C. 1976); United States ex rel. Vance v. Westinghouse, 363 F. Supp. 1038 (W.D. Pa. 1973).

cert. denied 364 U.S. 894 (1960); United States ex rel. McCans v. Armour & Co., 146 F. Supp. 546 (D.D.C. 1956), aff'd 254 F.2d 90 (D.C. Cir.), cert. denied, 358 U.S. 834 (1958).

Therefore, there is no question that if this action were governed by the law in existence in 1984, this court would have no jurisdiction over Mrs. Newsham's complaint, and it would have to be dismissed.

2. The 1986 Amendments

In 1986, Congress amended the False Claims Act. In relevant part, the Act now provides that any person may bring a qui tam action for violation of the substantive provisions of the False Claims Act. The Act no longer contains a provision barring suit if the material information is known by the Government at the time the suit is brought. Instead, the law now allows a person to bring a qui tam case, even on any information already known to the Government, as long as the Government has not previously filed suit using the same information, or the information has not been publicly disclosed.5/ 31 U.S.C. § 3730(e) now provides:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

5/ There has been no contention in this case that the Government's investigation of Mrs. Newsham's hotline complaint was publicly disclosed prior to the date this suit was filed.

> (B) For purpose of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

The effect of these amendments to the qui tam provisions was substantially to modify the jurisdictional bar. Thus, pre-existing government knowledge of the allegations contained in a complaint is no longer a bar to an action by the relator. Nonetheless, Congress still determined to preserve the prohibition against parasitical lawsuits. Therefore, a relator is barred from proceeding if there has been a prior public disclosure of the allegations, unless the relator can establish that she is an original source. These provisions have the effect of allowing someone like Mrs. Newsham, who was barred under the old Act because she reported the allegations to the Government, to proceed with the action under the new Act.

3. The New Law Is Presumed To Apply Immediately

The Supreme Court has stated that, as a general principle, "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. School Board City of Richmond, supra at 711.6/ See Thorpe v.

6/ See also Eikenberry v. Callahan, 653 F.2d 632, 633 (D.C. Cir. 1981) (amendment to 28 U.S.C. § 1331 eliminating the $10,000 jurisdictional amount in Federal Question cases held to retroactively apply to pending cases):

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Housing Authority of Durham, 393 U.S. 268 (1969); see also United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801); Campbell v. United States, 809 F.2d 563 (9th Cir. 1987); In Re Reynolds, 726 F.2d 1240 (9th Cir. 1984). The Bradley principle means that:

> . . . it is unnecessary to find affirmative support in a statute or its legislative history for applying it to pending cases. A statute will be presumed to apply to cases pending at the time of its passage unless there is a "clear indication" that it is not to apply.

United States v. Marengo County Comm'n, 731 F.2d 1546, 1553 (11th Cir. 1984).

Several district courts have applied the Bradley presumption of immediate application to the 1986 False Claims Act Amendments. United States v. Board of Education of City of Union City, 697 F. Supp. 167, 171 (D.N.J. 1988); United States v. Hill, 676 F. Supp. 1158, 1166 (N.D. Fla. 1987); United States v. Ettrick Wood Products, 683 F. Supp. 1262, 1265 (W.D. Wis. 1988); United States v. Fischbach & Moore, Inc., Cir. No. 1-87-293 (E.D. Tenn. April 27, 1988) and United

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In the absence of an express congressional statement on the applicability of legislation to pending cases, retroactivity is the rule. As the Supreme Court stated in Bradley, "[E]ven where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." It must be emphasized that it is for Congress to specifically provide for nonretroactivity if that is its intent.

(footnote and citation omitted).

States v. Oakwood Downriver Medical Center, 687 F. Supp. 302, 306-307 (E.D. Mich. 1988).

Since Congress did not specifically provide for prospective applicability in the 1986 Amendments, the applicable presumption is that the Amendments are to be applied to all cases pending on the date of enactment and to all subsequently filed cases, regardless of whether those cases involve pre-amendment conduct. Union City, supra, at 171-172, Hill, supra at 1165-1172; Oakwood supra at 302-307.7/ Congress surely knows how to restrict application of the laws it enacts when it desires to do so. Eikenberry, 653 F.2d at 633-634 & n.5. Indeed, in marked contrast to the False Claims Act Amendments, two other civil fraud remedies statutes passed by Congress in the same legislative session contain specific provisions prohibiting their application to any pre-enactment conduct:

7/ Normal canons of statutory construction support immediate application of the Amendments to all pending and subsequently filed cases involving pre-amendment activities. "There is no injustice in allowing declaratory statutes to apply retroactively since they do not change the prior state of law . . . [These statutes] should be applied retroactively without hesitation." 1A C. Sands, Sutherland's Statutory Construction § 26.06 (4th ed. 1985) (emphasis added). Furthermore, "[c]ourts have consistently upheld the retroactive application of 'curative' legislation which corrects defects subsequently discovered in a statute and which restores what Congress had always believed the law to be." Long v. United States Internal Revenue Serv., 742 F.2d 1173, 1183 (9th Cir. 1984). Congress' codifications of judicial decisions into statutory law comporting with Congressional intent thus are presumed to be immediately applicable. Stockdale v. Insurance Cos., 87 U.S. (20 Wall.) 323, 331 (1874); Temple University v. United States, 769 F.2d 126, 134 (3d Cir. 1985), cert. denied 106 S. Ct. 2914 (1986); Silverlight v. Huggins, 488 F.2d 107, 109 (3d Cir. 1973). See also 2 C. Sands, Sutherland Statutory Construction § 41.11, at 290.

A. In the Program Fraud Civil Remedies Act of 1986 Pub. L. 99-509, tit. VI(B), § 6101, 100 Stat. 1984 (Oct. 21, 1986)), Congress provided that the Act "was to apply to any claim made, presented, or submitted after the statute's effective date." Id. § 6104.

B. In the Anti-Kickback Enforcement Act of 1986, Pub. L. 99-632, 100 Stat. 3523 (Nov. 7, 1986), Congress provided that the Act shall apply to prohibited conduct that took place after the date of enactment. Id. § 3.

Similarly, in the previous session of Congress, amendments to the False Claims Act relating solely to Department of Defense contracts were specifically made applicable only to claims submitted after the date of enactment. Department of Defense Authorization Act of 1986, Pub. L. No. 99-145, 99 Stat. 583 (1985).

The absence of any similar language in the False Claims Act Amendments of 1986 indicates that Congress intended the Amendments to apply to virtually all pending litigation.[8/] See also Hastings v. Earth Satellite Corp., 628

8/ Contemporaneous legislative history shows that the drafters of the False Claims Amendments Act were fully aware of the provisions of the other statutes considered at the same time. When first considered by the House Judiciary Committee, the False Claims Act and the Program Fraud Act were both part of the same bill, H.R. 4827. Further, the report of the Senate Judiciary Committee on the Amendments to the False Claims Act states that "language was added to further define the constructive knowledge definition so that it paralleled that found in S. 1134, the Program Fraud and Civil Remedies Act as reported favorably from the Governmental Affairs Committee.... [T]he Committee thought it unwise to allow the possibility of confusion and the lack of a uniformly applied standard in administrative and judicial false claims actions." S. Rep. No. 345, 99th Cong., 2d Sess. 17 (1986); see also id. at 20-21. The same Committee report comments that it adopted the treble damages provisions "to

(Footnote cont'd on next page)

F.2d at 85 at 92-93 (D.C. Cir.), cert. denied 449 U.S. 905 (1980) (where prior amendments to D.C. Workmen's Compensation Act specifically prohibited application to pre-amendment conduct, the absence of any similar prohibition in the 1972 amendments shows that Congress intended that those amendments be applied to all pending and subsequently filed cases).

4. Immediate Application Of The Amendments Will Not Result In Manifest Injustice

The 1986 Amendments introduced no "substantive" changes -- i.e., creation of new liabilities -- into the False Claims Act. The Amendments clarify Congressional intent, resolve conflicts among the circuits, and provide for a more effective remedy without changing underlying liability. Under the Supreme Court's decision in Bradley, the Amendments are to be applied to all pending and future cases "unless doing so would result in manifest injustice." 416 U.S. at 711. As more fully discussed below, the Amendments are curative and remedial in nature. Therefore, it cannot be said that their immediate application would result in any "manifest injustice." Indeed, "[a]pplication of the 1986 amendments to all pending cases would further the remedial purpose" of the Amendments. Hill, supra at 1168.

In passing the new qui tam provision, Congress sought to encourage the filing of new lawsuits based on preexisting liabilities. Congress's goal in amending the qui tam provisions was to provide more effective means for recovering monies taken from the Treasury by fraud, and that goal will be effectuated by application of the

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comport with legislation passed earlier in the 99th Congress (Pub. L. 99-145, Department of Defense Authorization Act, 1986)." Id. at 17.

amendments to qui tam cases filed after enactment of the amendments. The clear intent of the legislation was curative, remedial and procedural, and such changes in the law are entitled under Bradley to immediate application.

Defendant argues that they are entitled to rely on the "government knowledge" jurisdictional bar of 31 U.S.C. § 3730(b)(4) as an affirmative defense and, therefore, the qui tam Amendment provision should not be retroactively applied to preamendment conduct.9/ Defendant cites as authority for this proposition the District Court decision in United States ex rel. Henry Boisvert v. FMC Corp., No. C-86-20613-WAI (N.D. Cal. Sept. 9, 1987), which was expressly adopted in United States ex rel. Hyatt v. Northrop Corp., Case No. CV 86-6457 (C.D. Cal. March 31, 1988).

Such reliance is misplaced since both cases cited by the defendant are inapposite to the case now before the court. Both cases involved suits filed under the qui tam provisions in effect before Congress amended the Act: the question before those courts was whether the old law or new law applied in determining the standing or capacity of the relator to sue in an action which was filed before the new law had been passed.

The FMC decision reached the correct result on the facts of that case – – the prior False Claims Act qui tam provisions were applicable to a suit filed prior to the 1986

9/ A defense based on the jurisdictional bar under prior law is not an "affirmative defense" in the traditional sense. The affirmative defenses listed in Rule 8(c) of the Federal Rules of Civil Procedure deal mainly with the avoidance of underlying liability, and lead to dismissal of the case on the merits. Rather, Lockheed's arguments in this case really go to the issue of the relator's capacity or standing to sue, a defense having nothing to do with underlying liability, and which is dealt with separately under Rule 9(a) of the F.R.C.P.

amendments to the Act.10/ However, the FMC conclusion that the new qui tam provisions affect "vested" or "antecedent" rights of defendants (and by implication, cannot be applied to cases filed after the date of enactment involving acts that occurred prior to the date of the amendments) conflicts both with Congressional intent and with applicable law, and should be rejected by this court.

The jurisdictional bar under prior law depriving a relator of standing if the Government was in possession of the information forming the basis for the relator's action, was a provision created entirely for the benefit of the Government; the fact that a defendant could move to dismiss a relator's case for lack of standing on this basis is incidental and did not create any "vested right" in defendants to such a defense.11/

10/ The United States submitted an amicus curiae memorandum in both cases in support of the proposition that the facts relating to a citizen's standing as a proper relator should be fixed as of the date he brings his suit. The need for this narrow exception to the Bradley presumption is attributable to the unique nature of the qui tam provisions – in many, and perhaps most qui tam cases, it would be impossible to apply the qui tam provisions of the new amendments (eg. the sealing provisions) to cases filed prior to the date of the amendments. Likewise, to the extent that Congress amended the qui tam provisions to encourage the filing of qui tam suits by relators, that Congressional purpose is not served with respect to suits already filed by the relators prior to the amendment.

11/ The statute specifically gave the district courts the responsibility, sua sponte, to dismiss any action brought based upon knowledge in the government's possession, 31 U.S.C. § 3730(b)(3), and did not convey any right to dismissal to a defendant. Further, governmental knowledge of the facts underlying a pre-amendment qui tam suit did not relieve the defendant of liability in the event that the United States either proceeded with the action or subsequently instituted a new action based on the same allegations.

Further, potential False Claims Act defendants, like Lockheed, have no vested right or expectation to any particular plaintiff or in any other change in law that affects only "the form of the action to be commenced." Terry v. Anderson, 95 U.S. 628, 633 (1877). As the Supreme Court has made clear, "as to the forms of action or modes of remedy it is well settled that the legislature may change them at its discretion." Id. See Meller v. Heil, 745 F.2d at 1305 ( ) ("a defendant does not have a vested right in application of a given remedial scheme"); see also Crane v. Hahlo, 258 U.S. 142 (1922) (transfer of eminent domain proceedings from court to administrative body did not impair vested rights).

Moreover, even if defendants could show a "vested right," which they cannot, the immediate application of the qui tam provision to this case, based on the defendants' pre-amendment conduct, works no "manifest injustice." In order for Lockheed's arguments to succeed, they must show that they actually relied upon some vested right in order for it be unjust for the right to be denied them now. Clearly, they cannot argue that they relied upon the former qui tam provision in this matter. See e.g., Hill, supra, at 1169.

Furthermore, Lockheed's arguments that the time of filing suit is not relevant to the court's determination are without merit. Both the prior law and the 1986 amendments refer to the time the complaint is filed in determining the capacity of a relator to bring an action. In similar circumstances, in cases in which a court must decide if it possesses diversity jurisdiction, the court's determination is restricted to the facts that existed on the date the complaint was filed. Smith v. Sperling, 354 U.S. 91, 93 n.1 (1957); Topp v. Compair Inc., 814 F.2d 830, 832 (1st Cir. 1987); Hawes v. Clum Ecuestre El Comandante, 598 F.2d 698 (1st Cir. 1979); Lugo-Vina v. Pueblo International, Inc., 574 F.2d 41, 42 n.1 (1st Cir. 1978). See also Wright, Federal Courts, § 28 at 107 (3rd Edition 1976).

IV. CONCLUSION

Therefore, for the above reasons, the United States respectfully submits that the False Claims Act Amendments of 1986, particularly those removing the jurisdictional bar against those who had previously informed the Government of fraud by a potentially culpable defendant, should be held applicable to all cases filed after their enactment, and that, as a result, the court should deny defendant's motion to dismiss.

s/Vincent B. Terlep
VINCENT B. TERLEP, JR.
Attorney for the United States

Dated: February 15, 1989

APPENDIX B

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel. DON H. HAYCOCK, Plaintiff-Appellant, v. HUGHES AIRCRAFT COMPANY, Defendant-Appellee.	No. 94-55620 94-55826 D.C. No. CV-90-01977-KN **MEMORANDUM***

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge Presiding

Argued and Submitted September 15, 1995
Pasadena, California

Before: T.G. NELSON and KLEINFELD, Circuit Judges, and WILKEN, District Judge.**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

After reviewing the record de novo, Jesinger v. Nevada Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994), we conclude that Haycock presented no evidence of fraud or false statement. We are unable to identify, in the evidence submitted, fraudulent allocations of employees to the direct as opposed to the indirect categories, double billing, or fraudulent accounting practices. Nor can we identify a cost accounting standard which Appellee was required to follow and did not follow. There is no evidence in the record which we have been able to find to show that Appellee improperly classified any indirect costs as direct costs, or overcharged for any of the fringe benefits and other entitlements associated with waiver costs. Whatever may have been arguable was disclosed to and approved by the government, so far as the evidence in the record shows.

Nor is there any evidence in the record to show a false certification under the Truth in Negotiations Act, 10 U.S.C. § 2306a(a), or false statement of cost or pricing data. 10 U.S.C. § 2306a(a)(2).

The district judge had discretion to award attorney's fees if it found that the relator's claim was "clearly frivolous," 31 U.S.C. § 3730(d)(4), and it did. This standard is met if "the plaintiff continued to litigate after" his claim "clearly became" groundless or without foundation. Hughes v. Rowe, 449 U.S. 5, 15 (1980). Our review of the attorneys' fees award is limited by the abuse of discretion standard. In re Washington Public Power Supply System, 19 F.3d 1291, 1296-97 (9th Cir. 1994). The district court was within its discretion in awarding attorneys' fees, as it did, for the period after Hughes served on the relator declarations of the relevant government

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** The Honrable Claudia Wilken, United States District Judge for the Northern District of California, sitting by designation.

officials showing that the cost allocation system was known to, and approved by, the government.

The district court's denial of his motion for reconsideration of the attorneys' fees award is reviewed for abuse of discretion. Barber v. Hawaii, 42 F.3d 1185, 1198 (9th Cir. 1994). The court was within its discretion in concluding the expert witness declaration filed by Haycock added nothing new on the question whether the relator should have stopped ligating after the disclosures which showed absence of fraud or false statement.

Appellee's request for attorneys' fees on appeal is denied. See Fed. R. App. P. 38; Amwest Mortg. Corp. v. Grady, 925 F.2d 1162, 1165 (9th Cir. 1991) (attorneys fees' not awarded where appeal not "clearly meritless").

AFFIRMED.

Tue Oct 15, 1996 8:38 am mailbox
memclerk/mail/standard Page 1

DATE	FROM	SUBJECT CODES
10/11/96	Judge Kleinfeld	Haycock v.Hughes 94-55620

Intended:
Sent: 10/11/96 at 5:16 p.m.
Delivered: 10/11/96 at 5:12 pm
To: Memoranda Clerk, Arms Unit, Memoranda Clerk, Opinions Clerk
CC: Judge T. Nelson, Judge Wilken via Fax, ARMS, Opinions Clerk
Ref: 961011171632-0700
From: Judge Kleinfeld Auth by:
Subject: Haycock v. Hughes 94-55620
Test [09/15/95 - Pasadena] 94-55826
[ajk/docs/septemb95/hay.md.fil]

I certify that all judges concerned concur in the attached 3-page memorandum disposition. Please file it simultaneously with the opinion just previously sent for filing. Thank you.

Priority: Urgent SEE PAGE Attachments [1]
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APPENDIX C

THE DEPARTMENT OF DEFENSE VOLUNTARY DISCLOSURE PROGRAM

A DESCRIPTION OF THE PROCESS

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-2884

FOREWARD

The Voluntary Disclosure Program is considered by the Department of Defense to be a cornerstone of self-governance by Defense contractors and a manifestation of cooperative relations between Government and industry. The commitment to the Voluntary Disclosure Program by Defense management remains strong. This is evidenced by the recent Defense Management Report to the President which emphasized the continued need for voluntary disclosure.

The Voluntary Disclosure Program is not an amnesty or immunity program, but rather a means by which Defense contractors can bring to light potential civil or criminal fraud matters. Those matters of a purely administrative nature, of course, shall not be included in the Program. In return for disclosing potential fraud and cooperating in any Government audit and investigation of the matter, the Government generally allows the contractor the opportunity to conduct an internal investigation which the Government then attempts to verify in an expedited manner. The Department of Defense further agrees generally not to initiate administrative actions until its verification process is completed.

Coordination of information is essential to the effective and expeditious resolution of the matter. By keeping all responsible Government parties informed of the status of the matter, problems identified may be more quickly resolved. Government representatives are then better

equipped to determine what, if any, criminal, civil, and administrative remedies are appropriate.

The pamphlet "The Department of Defense Voluntary Disclosure Program – A Description of the Process" describes general guidelines, policy, and processes used by Department of Defense and Department of Justice personnel who share the responsibility in the resolution of fraud matters. The process described in the pamphlet is intended to allow for flexibility, when needed, in the audit, investigations, and verification of matters brought into the Voluntary Disclosure Program.

Susan J. Crawford
Inspector General

THE DEPARTMENT OF DEFENSE VOLUNTARY DISCLOSURE

A DESCRIPTION OF THE PROCESS

The purpose of this pamphlet is solely to describe the process used by the Department of Defense and the Department of Justice in the Administration of the Department of Defense Voluntary Disclosure Program. The pamphlet does not, nor should be relied on, to create, confer, or grant any rights, benefits, privileges, or protections enforceable at law or in equity by any person, business, or entity in either civil, criminal, administrative, or other matters. This pamphlet does not in any way limit the lawful litigative prerogatives of the Department of Defense and Department of Justice.

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE

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A. PURPOSE

1. The Department of Defense (DoD) encourages Defense contractors to adopt a policy of voluntarily disclosing potential civil or criminal fraud matters affecting their corporate contractual relationships with the DoD as a central part of their corporate self-governance and to enhance contractor responsibility under the Federal Acquisition Regulations. The policy is described in letters from the Deputy Secretary of Defense to Defense contractors, dated July 24, 1986, and August 10, 1987 (Appendix A). The Assistant Inspector General for Criminal Investigations Policy and Oversight (AIG-CIPO), Office of the Inspector General, DoD, is the designated point of contact for voluntary disclosures of potential criminal or civil fraud issues. Matters not involving fraud should be presented to the appropriate contracting officer or Defense Contract Audit Agency (DCAA) auditor.

2. The disclosures are made with no advance agreement regarding possible DoD resolution of the matter and with no promises regarding potential civil or criminal actions by the Department of Justice (DOJ). Prompt voluntary disclosure, full cooperation, complete access to necessary records, restitution, and adequate corrective actions are key indicators of an attitude of contractor integrity even in the wake of disclosures of potential criminal liability.

3. The DoD Voluntary Disclosure Program is intended to afford contractors the means to report self-policing activities. It provides a framework for Government verification of the matters voluntarily disclosed and an additional means for a coordinated evaluation of administrative, civil, and criminal actions appropriate to the situation.

4. This pamphlet identifies the participating DoD and DOJ organizations and describes the process by which voluntary disclosures are reported, verified, and acted on.

The complete process for managing voluntary disclosures is depicted in a flowchart (Appendix B).

B. ORGANIZATIONAL FUNCTIONS

The organizations listed below have the following functions under the DoD Voluntary Disclosure Program:

1. Office of Assistant Inspector General for Criminal Investigations Policy and Oversight (AIG-CIPO)

The AIG-CIPO receives the initial disclosure, makes a preliminary determination as to whether the disclosure satisfies the requirements of the DoD Voluntary Disclosure Program, coordinates the execution of the standard Voluntary Disclosure Agreement, assigns the matter to a Defense criminal investigative organization (DCIO) for verification, assigns the matter to a suspension and debarment authority, and coordinates the matter with the DOJ for potential civil and criminal action. The AIG-CIPO also serves as the focal point for the dissemination of general information concerning the Voluntary Disclosure Program, is responsible for administering the Program, and coordinates administrative action within the DoD.

2. Defense Criminal Investigative Organizations (DCIOs)

The U.S. Army Criminal Investigation Command (USACIDC), the Naval Investigative Service (NIS), the Air Force Office of Special Investigations (AFOSI), and the Defense Criminal Investigative Service (DCIS) are the Defense criminal investigative organizations (DCIOs) that conduct investigations under the Program. One DCIO will serve as the lead investigative agency. Following admission into the DoD Voluntary Disclosure Program, the lead DCIO in coordination with other DCIOs when appropriate, conducts an investigation to verify the accuracy and completeness of the matter(s) disclosed. The lead DCIO, may request the Defense Contract Audit

Agency (DCAA) to conduct a verification audit that will generally be based on the contractor's internal report of investigation. The lead DCIO coordinates its activities with the AIG-CIPO, the DOJ, the DCAA, and the cognizant suspension and debarment authority.

3. Defense Contract Audit Agency

The DCAA will, in most instances, be requested by the lead DCIO to conduct a verification audit of the matter(s) disclosed. The audit normally begins following receipt of the contractor's internal report of investigation and focuses on those matter(s) disclosed in the internal report of investigation not covered by a previous audit.

4. DoD Suspension and Debarment Authorities

A Military Department or Defense Agency has lead agency responsibility for any suspension or debarment determination resulting from the matter(s) disclosed. The decision whether or not to initiate suspension or debarment action takes into consideration, among other things, the Government verification of the contractor's disclosure, the contractor's cooperation, the adequacy of corrective action, and restitution.

5. The Department of Justice

a. The Department of Justice Guidelines regarding the Voluntary Disclosure Program set forth complete guidance for the Department of Justice on referral, investigation and prosecution of voluntary disclosure matters.

b. The Defense Procurement Fraud Unit (Unit) in the Fraud Section, Criminal Division, DOJ, is the point of contact within the DOJ to oversee voluntary disclosure matters. The Unit reviews all voluntary disclosure matters.

(1) The Unit conducts, or refers to the appropriate U.S. Attorney's Office to conduct, whatever

preliminary inquiry is deemed necessary to determine whether there is specific credible evidence suggesting prosecutable violations of Federal laws. If such evidence exists, the matter will be investigated.

(2) The United States Attorney's Office notifies and obtains the concurrence of the Unit prior to any decision to prosecute or decline prosecution of a volunteer corporation.

c. (1) In deciding whether to prosecute, where the law and evidence is otherwise sufficient to initiate prosecutive action, the prosecutor considers among other factors, the truthfulness, completeness, and timeliness of the disclosure; the quality and quantity of the information provided therein; whether a compliance program, including preventive measures, was in place prior to the illegal activity; the extent of the fraud; the pervasiveness of the fraud; the level of the corporate officials involved in the fraud; the degree, extent, quality, and timeliness of the contractor's cooperation in the verification of the disclosure; and the remedial action taken by the contractor.

(2) The determination of whether to initiate or decline prosecution is the sole responsibility of the Department of Justice in accordance with the recommended criteria set forth in the DOJ Voluntary Disclosure Guidelines.

d. The Civil Division, Department of Justice, is responsible for determining whether to seek civil fraud damages in voluntary disclosure matters.

C. DESCRIPTION OF PROCESS

1. The Initial Disclosure

a. The AIG-CIPO – Defense contractors wishing to make a disclosure as part of the DoD Voluntary Disclosure Program should be directed to the Assistant

Inspector General for Criminal Investigations Policy and Oversight (AIG-CIPO), telephone (703) 604-8710.

b. Confirmation Letter – When the initial contact with the AIG-CIPO is made by telephone, the contractor will be asked to send a letter confirming the information presented.

2. Case Control Number

Control Number – A control number is assigned to each voluntary disclosure (e.g., CIPO 012). The control number is reflected on all communications between the AIG-CIPO, the Military Departments, the Defense Agencies, and the DOJ. The control number is not intended to replace any internal DCIO or DOJ assigned case identification number.

3. Preliminary Acceptance

a. Criteria – A matter will be preliminarily accepted into the DoD Voluntary Disclosure Program if the AIG-CIPO determines that:

(1) the contractor disclosed sufficient information as defined in paragraph C.3.b. below, and

(2) the disclosure was not triggered by the contractor's recognition that the potential criminal or civil fraud matter or the underlying facts were about to be discovered by the Government through audit, investigation, contract administration efforts, or reported to the Government by third parties. One factor in determining whether the requirement has been met is whether the Government had prior knowledge of the matter(s) disclosed.

b. Sufficient Information

(1) Information sufficient for preliminary acceptance into the DoD Voluntary Disclosure Program requires the contractor to disclose, at a minimum, the contractor's name, the corporate division(s) affected, the

location of the affected division(s), the Defense Agency(ies) and Military Department(s) affected if known, and the nature and description of the potential fraud. The contractor should also provide, if known, the DoD component with contract administration responsibility, along with the contract number and type, and the estimated financial impact to the Government. Sufficient information should include the nature, effect, time period, and any proposed remedy for the defect, as well as the identification of all end users if the matter disclosed involves defective products or testing.

(2) Since the DoD recognition of a contractor as a "volunteer" depends on the disclosure not being triggered by the contractor's recognition that the potential civil or criminal fraud matter or the underlying facts were about to be discovered by or disclosed to the Government, the AIG-CIPO must have sufficient information regarding the disclosure to do the following:

(a) Conduct an inquiry to learn if the Government had prior knowledge of the matter disclosed by matching factual information from existing investigations and audits with the new disclosure (see paragraph C.6. below).

(b) Determine whether to delay the audit and investigation until the contractor's report of investigation has been received (see paragraph C.13. below).

(c) Determine whether later identified matters are within the scope of the original disclosure.

c. Date of Preliminary Acceptance – The date on which the contractor discloses sufficient information in accordance with paragraphs C.3.a. and b. above, is the date on which the matter is determined to have been preliminarily accepted into the DoD Voluntary Disclosure Program. When the standard Voluntary Disclosure Agreement (hereafter referred to as the "XYZ Agreement,"

Appendix C) is executed, the date of admission into the DoD Voluntary Disclosure Program relates back to the date of preliminary acceptance.

4. Failure to Disclose Information

The AIG-CIPO may refuse to admit a matter into the DoD Voluntary Disclosure Program if the AIG-CIPO determines that the contractor knowingly failed to disclose relevant available information, and such information is obtained through other sources.

5. Notification Requirements Relating to Defective Products and Testing

When a disclosure concerns defective products or testing, the lead DCIO promptly notifies the affected Military Department(s) and Defense Agency(ies) of any potential safety or operational hazards. This notification is required by DoD Directive 7050.5, "Coordination of Remedies for Fraud and Corruption Related to Procurement Activities," June 7, 1989.

6. Inquiry for Prior Government Knowledge

a. Initiation of Inquiry – Based on the information supplied by the contractor, the AIG-CIPO conducts an inquiry to determine whether the Government had prior knowledge of the matter disclosed. The inquiry is neither binding nor conclusive as to whether the disclosure was triggered by the contractor's recognition that the underlying facts of the potential fraud were about to be discovered by the Government, or as to whether the matter should be admitted into the DoD Voluntary Disclosure Program. Rather, it is one factor considered in making a preliminary determination whether to admit the matter.

b. Inquiry Assignment – Once sufficient information is provided by the contractor, the AIG-CIPO conducts an initial inquiry to determine whether the Government had prior knowledge of the matter disclosed. In most instances, the following inquiries are made:

(1) DCIO Inquiry – A DCIO is requested to conduct a Defense Central Index of Investigations (DCII) check for open cases that could incorporate the matter(s) disclosed. When appropriate, the DCIO may be requested to make further inquiries to DCIO field offices as to the matter(s) disclosed.

(2) DCAA Inquiry – The DCAA representative to the DPFU is asked to determine whether the matter(s) disclosed is:

(a) a matter presently proposed for audit by DCAA where notification has been given to the company;

(b) a matter that is presently or has been the subject of a DCAA audit; or

(c) a matter in which the DCAA has issued an audit report or report of suspected irregularity. The DCAA is also asked to provide information regarding the nature and scope of the audit to determine whether the DCAA audit activities could incorporate the matter(s) disclosed.

(3) Federal Bureau of Investigation (FBI) Inquiry – The FBI representative to the DPFU is requested to determine whether there is an ongoing or previously conducted FBI investigation that could incorporate the matter(s) disclosed.

(4) Defense Procurement Fraud Unit (DPFU) Inquiry – The DPFU is requested to determine whether there are any ongoing or previously conducted criminal investigations or litigation that could incorporate the matter(s) disclosed. If the matter(s) disclosed suggest possible antitrust implications, the DPFU is asked to determine whether there are any ongoing or previously conducted antitrust investigations or litigation that could impact on the disclosure.

(5) Civil Division, DOJ, Inquiry – The Civil Division, DOJ, is requested to determine whether

there are any ongoing or previously conducted civil investigations or litigation, including False Claims Act qui tam suits (31 U.S.C. 3729 et seq.), in which the matter(s) disclosed could be incorporated.

(6) Suspension and Debarment Inquiry – The cognizant suspension and debarment authority is requested to determine whether there are any ongoing or prior suspension and debarment actions that could involve the matter(s) disclosed.

(7) Other Inquiries – When appropriate, other Inspectors General and investigative agencies may be contacted to inform them of matters that may impact on their programs or operations, or determine whether they are aware of any investigations or litigation that may impact on the matter(s) disclosed.

7. Notification of Preliminary Acceptance

When a decision is made to preliminarily accept a matter into the DoD Voluntary Disclosure Program, the contractor is advised in writing (Appendix D). The letter explains that the contractor's continued participation in the program is contingent on prompt execution of the standard XYZ Agreement, compliance with the terms of the XYZ Agreement, and compliance with the requirements set forth in the Deputy Secretary of Defense letter of July 24, 1986. The standard XYZ Agreement is enclosed with the letter. Copies of the letter are forwarded to the DPFU; the Civil Division, DOJ; the assigned DCIO(s); the DCAA; and the cognizant suspension and debarment authority.

8. Matters Rejected

The contractor is advised in writing if the matter is rejected from inclusion in the Voluntary Disclosure Program (Appendix E). The letter, however, encourages the contractor to cooperate in the Government audit and investigation. Copies of the letter are forwarded to the DPFU; the Civil Division, DOJ; the DCIO(s); the DCAA; and the cognizant suspension and debarment authority.

9. XYZ Agreement

The standard XYZ Agreement is used in all disclosure matters absent compelling circumstances requiring deviation. The XYZ Agreement should be signed promptly by an authorized director or officer of the contractor, preferably within two weeks of receipt, and returned to the AIG-CIPO. When signed by all required signatories, copies are sent to the DPFU; the Civil Division, DOJ; the assigned DCIO(s); the DCAA; and the cognizant suspension and debarment authority.

10. Failure to Sign XYZ Agreement

The AIG-CIPO will attempt to resolve any outstanding issues concerning the XYZ Agreement. In the event the contractor refuses to sign the XYZ Agreement or makes demands that are unacceptable to the Government, the AIG-CIPO will advise the contractor in writing of the removal of the matter from the DoD Voluntary Disclosure Program (Appendix F). Copies of the letter are forwarded to the DPFU; the Civil Division, DOJ; the DCIO(s); the DCAA; and the suspension and debarment authorities.

11. Notification of Admission into the Voluntary Disclosure Program

Following execution of the XYZ Agreement, the AIG-CIPO notifies the contractor in writing confirming the admission of the matter into the DoD Voluntary Disclosure Program (Appendix G). The contractor, if it has not already done so, will be asked to inform the AIG-CIPO within ten days of the execution of the XYZ Agreement whether a written report will be provided describing the results of the contractor's internal investigation. In addition, the contractor is informed that any written report should be submitted within 60 days of the initial disclosure. The AIG-CIPO's confirmation letter will identify the responsible DCIO(s), the cognizant suspension and debarment authority, and the points of contact within each. Copies of the letter are sent to the DPFU; the Civil

Division, DOJ; the responsible DCIO(s); the DCAA; and the cognizant suspension and debarment authority.

12. Contractor Internal Report Investigation

a. Internal Investigation – The contractor determines whether an internal investigation will be conducted. While the Government does not require such an investigation, it generally is in the best interest of the contractor to conduct their own investigation and submit a report describing the results.

b. Timely Completion of Report – Contractors choosing to provide CIPO with a written report describing the results of their internal investigation are requested to submit their report within 60 days of the initial disclosure. If the contractor is unable to complete the report within 60 days, the contractor should request an extension of time. The AIG-CIPO will determine if and on what basis an interim report(s) should be provided.

c. Distribution of Report – The AIG-CIPO sends to the contractor a letter confirming receipt of the contractor's internal report of investigation (Appendix H), and distributes copies (with restrictive markings to protect proprietary/sensitive contents) to the assigned DCIO(s); the DPFU; the Civil Division, DOJ; the DCAA (if the disclosure relates to contract fraud); and the assigned suspension and debarment authority. When appropriate, the DPFU distributes a copy to a U.S. Attorney for prosecutive review. The Civil Division, DOJ, forwards a copy to any U.S. Attorney involved in related civil litigation.

13. Government Actions Pending Contractor Internal Investigation

a. Timing of Government Investigation – As a general rule, the Government does not begin the verification process or conduct its own audit or investigation until it has received the contractor's internal report of investigation. The Government, however,

reserves the right to begin its own audit or investigation at any time. Under certain circumstances, the contractor may be asked to discontinue or limit its internal investigation.

b. Statute of Limitations – During completion of the contractor's internal investigation, if the Government determines that the criminal or civil statute of limitations will expire as to the matter disclosed, or any part thereof, within one year after submission of the contractor's report, the Government, at its option, may request the contractor to waive the statute of limitations for a period it deems appropriate. Refusal to waive the statute of limitations will be considered in evaluating the cooperation of the contractor.

14. Verification

a. Investigative Plan – Following receipt of the contractor's internal report, the designated DCIO(s) begins the verification process. The verification audit and investigation are given sufficiently high priority to allow for its expedited completion. The DCIO prepares a written investigative plan and coordinates it with the criminal prosecutor assigned to the matter, and the Civil Division, DOJ. The plan focuses the investigation, serves as a roadmap for the DCIO(s), and provide a means for the DCIO(s) to track the progress and ensure timely completion of the verification process.

b. DCAA Verification Audit – The DCIO(s), in most instances, request the DCAA to conduct a verification audit. The DCAA auditor assigned to the matter is briefed on the investigative plan to ensure a coordinated effort. If sufficient information is available and the circumstances warrant, the DCIO(s) may begin its own investigation prior to completion or in conjunction with the audit.

c. Scope of Verification Audit and Investigation – The scope of the verification audit and investigation focus specifically on the matters disclosed by the contractor, and include the quantification of the Government losses and potential civil forfeitures under the

False Claims Act. Unrelated fraud allegations developed during the verification process are pursued by the initiation of an independent audit or investigation in accordance with normal procedures unless their relationship to the matter disclosed is so commingled as to prevent their severance. Such allegations are not treated as part of the Voluntary Disclosure Program without prior coordination with the AIG-CIPO.

15. Contractor's Cooperation During the Verification

The contractor's cooperation is essential to the verification audit and investigation. Problems regarding the contractor's cooperation that cannot be readily resolved by the DCIO field agent and the DCAA auditor (e.g., refusal to supply records or allow interviews), are promptly brought to the attention of the respective headquarters of the DCIO(s) and the DCAA for resolution. Where the contractor's cooperation is unsatisfactory, the headquarters of the DCIO and/or the DCAA promptly notify the AIG-CIPO in an attempt to resolve the issue. The AGI-CIPO will, in turn, notify the DPFU of the unsatisfactory cooperation. When appropriate, the AIG-CIPO, with the assistance of the Office of the General Counsel, DoD, will attempt to resolve the problem with counsel representing the contractor.

16. Use of Subpoenas

The DoD Voluntary Disclosure Program assumes contractor cooperation. Should subpoenas for documents be necessary, it is standard procedure to use Inspector General subpoenas rather than grand jury subpoenas. Prior to the issuance of a grand jury subpoena in a voluntary disclosure matter, the assigned DCIO agent promptly notifies the DCIO headquarters, which in turn, notifies the AIG-CIPO.

17. Defense Criminal Investigative Organizations (DCIOs) Case Management and Progress Reports

a. Progress Report – The DCIO headquarters monitor all voluntary disclosure matters assigned to their organization to ensure adequate progress and expeditious completion. The DCIOs forward a progress report for each voluntary disclosure investigation every 90 days to the AIG-CIPO (Appendix I). On receipt of the 90-day progress report, the AIG-CIPO forwards a copy to the DPFU; the Civil Division, DOJ; and the DCAA. The progress reports separately summarize each ongoing investigation, incorporating the following information:

(1) subject(s), including corporate name, affected division(s), and affected location(s);

(2) the investigative organization assigned case number, the CIPO assigned disclosure control number, and the DCIO(s) field office assigned to conduct the investigation;

(3) an initial summary, including allegations, Military Departments and Defense Agencies affected, the time frame in which the allegation occurred, the identification of contracts under investigation, the status of the contracts, and the contractor's estimated cost impact to the Government;

(4) matters involving defective products or testing include a description of the defect, the effect on health or safety, the time period involved, notice to the users, and corrective action taken;

(5) updates include all newly acquired information including prosecutive status (both civil and criminal), new cost impact figures calculated by either the contractor or the DCAA, changes in the scope of the investigation, new allegations raised, or allegations determined to be unfounded;

(6) other significant information to be reported includes declination of prosecution, criminal indictment, use of subpoenas, and any problems arising during the audit and investigation such as poor cooperation or need for subpoenas;

(7) date audit was completed and date the investigation was closed; and

(8) monies offered by the corporation, accepted by the Government, including checks, credits, or other offsets.

b. Progress Report Reviews – Each DCIO schedules a meeting at a location of its choice within 14 days of the progress report to review the status and planned actions of each open investigation. Attendees at the meeting may include a representative from the OAIG-CIPO; the DCIO; Office of General Counsel, DoD; the DPFU; and Civil Division, DOJ.

18. Payments by Contractors

a. Required Coordination with the Civil Division, DOJ – Collection of any civil damages for all DoD voluntary disclosure matters is the responsibility of the Civil Division, DOJ. Unsolicited payments, restitution, or any other funds representing the contractor's estimate of the cost impact of the matters disclosed are coordinated with the Civil Division, DOJ, and the DPFU prior to acceptance. While it should be determined if the contractor is willing to make restitution, specific requests for payment are coordinated with the Civil Division, DOJ, and the DPFU. When it is agreed that payment is appropriate, contractors desiring to pay restitution or make good faith reimbursements are instructed to provide a check to the AIG-CIPO made payable to "the Treasurer of the United States."

b. Other Required Coordination – The Civil Division, DOJ consults with the criminal prosecutor assigned to the matter, the AIG-CIPO, and the suspension

and debarment official, and determines whether immediate payment by the contractor would be in the Government's best interests with respect to its potential civil remedies.

c. Requirements Affecting Good Faith Reimbursements – When determined that an unsolicited payment will be accepted or a payment will be solicited and accepted, the acceptance is conditioned on a written agreement with the contractor that provides:

(1) acceptance of the payment does not constitute the Government's agreement as to the contractor's ultimate civil or criminal liability for the matter(s) disclosed, and

(2) acceptance shall not prejudice the Government's right to obtain additional damages, fines, and penalties for the matter(s) disclosed.

19. Removal of a Matter from the DoD Voluntary Disclosure Program

a. Reason for Removal – The AIG-CIPO may remove a matter from the DoD Voluntary Disclosure Program at any time during the verification process if:

(1) the disclosure is determined not to meet the Program requirements as set forth in the Deputy Secretary of Defense letter of July 24, 1986, or

(2) the contractor has violated the terms of the signed XYZ Agreement.

b. Notice of Removal – Prior to removing a matter from the Voluntary Disclosure Program, the AIG-CIPO will notify the contractor in writing of the proposed decision to remove the matter, and may provide the contractor an opportunity to respond (Appendix J). A copy of the letter is sent to all DCIOs, suspension and debarment authorities, the DPFU, the Civil Division, DOJ, and the DCAA. The decision to remove is at the sole discretion of the AIG-CIPO.

20. Case Completion

a. Records Required – A matter administered under the DoD Voluntary Disclosure Program is closed when the following documents have been provided to the AIG-CIPO.

(1) Notification by the designated DCIO(s) that both the audit and investigation are completed and the matter is closed. The notification identifies the DCAA final dollar impact determination to the Government, the final settlement, and the manner in which the losses were recovered or otherwise resolved.

(2) A letter from the DPFU either confirming the declination of criminal prosecution or indicating the results of any prosecutive actions taken.

(3) A letter from the Civil Division, DOJ, declining civil litigation or indicating the results of civil litigation or settlements.

(4) A letter from the DPFU indicating the results of any prosecutive actions or settlements if the Antitrust Division, DOJ, is involved in the investigation, or a U.S. Attorney has reviewed the matter for potential antitrust violations.

(5) A letter from the designated suspension and debarment authority advising the AIG-CIPO in writing of any action taken or to be taken as to suspension or debarment of the contractor or persons within the contractor's organization.

b. Notification that the Matter is Closed – The AIG-CIPO notifies the DoD contractor in writing that the matter(s) administered under the Voluntary Disclosure Program is closed when the appropriate documents mentioned in paragraph C.20.a.(1) through (5) are received (Appendix K).

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IN THE
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Petitioner,

v.

UNITED STATES *EX REL.* WILLIAM J. SCHUMER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The Washington Legal Foundation will address the following questions:

1. Whether the False Claims Act's "public disclosure" bar to suits by *qui tam* relators who are not original sources is activated when the misconduct at issue previously had been disclosed to a non-participant in the alleged fraudulent conduct.

2. Whether actual or potential financial loss to the government is an essential element of a claim under the False Claims Act.

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BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas of the law, WLF devotes a substantial portion of its resources to ensure that the civil justice system and the courts are not abused by excessive or unwarranted litigation. *See, e.g., Lujan v. Defenders of*

Wildlife, 504 U.S. 555 (1992) (lack of injury tc plaintiff precludes citizen suit under Article III); *BMW of North America, Inc. v. Gore*, 115 S. Ct. 1589 (1996) (excessive punitive damages violates Due Process Clause); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1993); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994) (constitutionality of *qui tam* provisions).

In particular, WLF believes that the *qui tam* provisions of the False Claims Act which themselves are constitutionally suspect, have been abused by the proliferation of "parasitic" lawsuits by relators in meritless cases such as this one. These meritless cases drain scarce judicial and governmental resources. WLF can bring a broader perspective to this case than can the parties, and believes that its participation will assist this Court in deciding the case. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

STATEMENT

A. Introduction

The Federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729-32 (1996), 18 U.S.C. § 287 (1995), is the government's principal civil and criminal weapon against fraud in federally-financed programs including defense contracting and health care. Most of the viable cases brought under the FCA have been originated or assumed by the Department of Justice; most of the cases brought by *qui tam* relators -- private individuals suing in the name of the United States -- have proved meritless and wasteful of the resources of the Justice Department, which is required

to investigate each such case. However, though the 1986 *qui tam* amendments to the FCA are precariously positioned as a constitutional matter, their offer of potentially-vast financial rewards to relators has created a kind of litigation lottery that has led to increasing numbers of relator suits and, because of draconian penalties and potential exclusion from federal programs, to increasing risk even to contractors who believe that they are law abiding but fear the vagaries and expense of litigation.

The nature and effect of the 1986 amendments require restraint in judicial interpretation of their reach. One particularly troublesome form of these *qui tam* cases is found in actions brought by "parasitic" relators -- persons who are not original sources of information provided to investigators but who latch on to active government investigations or corporate self-disclosures -- who bring suits that the government has concluded are unmeritorious or premature. Congress had sought to limit the reach of these parasites, while assuring that original sources and true whistleblowers could maintain actions in the name of the United States. Thus, the 1986 FCA amendments preclude a relator's action if the subject of his claim had been publicly disclosed, unless the relator was the original source of the information.

This Court should hold that "public" disclosure includes disclosure to *any* person not involved in the alleged fraud, and accordingly should reverse the judgment of the Ninth Circuit. This Court also should reverse because a false claim cannot properly be premised on conduct that neither caused nor could have caused any loss to the government.

B. Factual Background

In the interests of judicial economy, amicus hereby adopts by reference the statement of the case as presented by the Petitioner. Nevertheless, amicus wishes to highlight several salient facts.

Hughes Aircraft was a subcontractor to develop radar for four separate government programs. Hughes allocated costs among the four programs according to "commonality agreements," which typically allow for allocation of costs in government contracts where work is common to both.

It was undisputed that, during a government audit conducted several years before the instant suit was brought, the questions concerning the propriety of the commonality agreements about which the relator later complained were widely discussed among employees of Hughes, the prime contractor, Northrop, and the government. (*See* J.A. at 30 ¶ 3, 172 ¶ 7.) The government then withheld about $15.4 million in payments which were later made when the government concluded, during the normal dispute resolution process, that the commonality agreements had saved, not cost, the government money. *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1516 (9th Cir. 1995).

In 1989, the relator, a former Hughes employee, filed suit claiming that the company had violated the FCA by mischarging costs from a fixed-price government contract to a cost-reimbursement contract. After fully investigating the matter, the Justice Department declined to intervene. Ultimately, the Ninth Circuit held that, while the commonality accounting practices employed by Hughes complied with government regulations, and indeed "had

actually saved the government money," *id.*, the relator stated a viable FCA action by challenging the adequacy and timeliness of Hughes' disclosure of its accounting methods.

Hughes argued to the Ninth Circuit, among other things, that the undisputed disclosure of alleged fraud to "innocent employees" of a contractor constituted an actual public disclosure. The court rejected the argument and the reasoning of the Second Circuit in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992). The court concluded that "the *Doe* court's treatment of employees as members of the public is unrealistic," *Hughes*, 63 F.3d at 1518, because such employees have strong incentives not to disclose their employer's misconduct to others and hence contravenes the intention of the drafters of the 1986 amendments to the FCA. The Ninth Circuit also held that the application sought by Hughes would run contrary to the purpose of the FCA by somehow restricting "the ability of insiders to bring suit once the government becomes involved in the matter." *Id.* at 1519.[1]

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[1] The Ninth Circuit also rejected Petitioner's argument that the potential availability through the Freedom of Information Act of the information concerning fraud constituted another means of public disclosure. Although the WLF sees merit in this argument, we concentrate our attention upon the *actual* disclosure that indisputably was made to persons not involved in the alleged fraud. Similarly, while it has not presented argument on the issue, WLF believes that Hughes has presented a meritorious argument that this case should be dismissed because the 1986 amendments to the FCA should not be afforded retroactive application.

SUMMARY OF ARGUMENT

Of the various arguments presented to the Court, WLF addresses two of them: 1) the applicability of the "public disclosure" bar to parasitic *qui tam* lawsuits under the FCA; and 2) the absence of any cognizable "claim" upon which an FCA suit could be based. Congress expressed a strong desire to bar *qui tam* actions brought by persons who were not the original source of the allegations of fraud, when there has been a prior "public" disclosure of the information at issue. Among the means specified for such disclosures are government audits and investigations. In the instant case, the information upon which the relator's case was based had been disclosed to "innocent" individuals in the context of the sort of administrative audit and investigation specifically described in the statutory bar to parasitic suits. Given the plain meaning of the statute, the constitutional precariousness of the *qui tam* regime, and the need for maximum clarity in view of the vast risks that even innocent contractors experience through FCA litigation, this Court should adopt the reasoning of the Second, Third and Tenth Circuits, holding that public disclosure occurs when the subject of the fraud is revealed to any stranger to the fraud. This satisfies the FCA's definition of "public" and the congressional intent to encourage fraud cases. Because of the onus of the FCA and because most of the cases in this burgeoning area of the law turn out to be non-meritorious, this Court also should adopt a bright-line rule for the summary disposition of public disclosure issues.

The Ninth Circuit also erred in holding that the relator had set forth a "claim" within the meaning of the FCA. The court of appeals itself recognized that the accounting procedures at issue not only had resulted in no loss to the

government but indeed had saved it money. In order to satisfy the constitutional case-or-controversy requirement of injury in fact, as well as the plain meaning of the statute, an FCA case must be based upon an actual or, in the case of an attempt, potential loss to the public fisc. Under the statute, "claim" is equated to an attempt to get payment; if a prohibited payment was impossible because the government suffered no loss, there is no "claim." While Hughes might have made an untimely or inaccurate "statement" -- subject to other federal laws or regulations -- it did not present a false "claim."

ARGUMENT

I. BECAUSE THERE WAS A "PUBLIC DISCLOSURE" OF THE ALLEGED FRAUD PRECEDING THE LAWSUIT, THE JURISDICTIONAL BAR AGAINST PARASITIC RELATORS APPLIES.

A. The Statutory Framework and the Jurisdictional Bar.

Expressing a congressional desire to prevent purely "parasitic" actions, the 1986 amendments to the FCA bar any would-be *qui tam* plaintiff from bringing suit if the information on which the action is based has been publicly disclosed and the relator is not the original source of the disclosed information. 31 U.S.C. § 3730(e)(4). The complaint here represents exactly the type of "parasitic" suit that Congress intended to preclude when it amended the law.

The FCA creates liability for any individual who "knowingly presents . . . to an officer or employee of the

United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). A private citizen may bring a claim on behalf of himself and the United States Government for a violation of the FCA. 31 U.S.C. § 3730(b). The government is given an opportunity to investigate the complaint and determine whether to intervene and proceed with the action, and if the government declines to intervene (which is the case here), the private citizen may proceed with the action alone. 31 U.S.C. § 3730(e)(4). But he may do so only if he is not barred by the jurisdictional impediments set out in 31 U.S.C. § 3730(e).

From the FCA's original passage until 1943, someone could originate a suit based on privately-obtained, or even publicly-available, information, and could maintain it to the exclusion of the Attorney General. In 1943, Congress amended the Act in response to the Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), to prevent "parasitical" suits. The 1943 amendments added a jurisdictional provision barring *qui tam* actions whenever the government had prior knowledge of the information in the complaint. Those amendments also authorized the Attorney General to enter the *qui tam* action and assume sole responsibility for its conduct. The relator still could continue the prosecution on his own if the Attorney General declined to take it over. In 1986, Congress amended the bar on "parasitical" suits and provided the relator with an ongoing, active litigation role even when the Attorney General enters the case.

From the inception of the FCA, the *qui tam* provisions attempted to satisfy competing interests: the creation of incentives designed to encourage disclosure of first-hand information regarding false claims in order to facilitate

private legal action by persons possessing such information, and the establishment of statutory protections designed to prevent opportunistic plaintiffs from filing frivolous actions. *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 702 (8th Cir. 1995).

Section 3730(e)(4)(A) now provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A).

Section 3730(e)(4) was "designed to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1155-56 (3d Cir. 1991). To comply with this jurisdictional limitation, a relator must establish either that there has been no prior "public disclosure" of the information on which his complaint is based or that he was the "original source" of the information *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1416 (9th Cir. 1992). "[T]he False Claims Act should not be read in a manner that impermissibly expands federal jurisdiction. [The relator] thus bears the burden of alleging facts essential to jurisdiction and

supporting those facts by competent proof." *United States ex rel. Fine v. MK-Ferguson*, 1996 WL 638479 at *5 (10th Cir. Nov. 6, 1996) (citation omitted); *see also*, *Price v. United States Gen. Servs. Admin.*, 894 F.2d 323, 324 (9th Cir. 1990); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). The Ninth Circuit was manifestly incorrect in concluding that this relator, who clearly is not an original source and who bears the burden of proof on the issue of jurisdiction, demonstrated that there had not been a public disclosure that should have barred his suit.

B. "Public Disclosure" Includes Disclosure By the Government to Private Individuals Previously Unaware of the Fraud.

"[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). Using normal rules of grammar, the jurisdictional bar can be restated as: FCA jurisdiction is foreclosed if the underlying allegations had been disclosed to the "public," *i.e.*, to a stranger to the fraud, through an administrative report, audit, or investigation. "Disclose" is defined as "to expose to view" or "to make known." Webster's Third New International Dictionary 645 (1981). In this instance government auditors who were investigating possible fraud made known their investigation and the allegations and transactions that later would undergird the instant suit to Hughes and Northrop employees who had not been aware of any fraud. Contrary to the illogical reading of the statutory bar given by the Ninth Circuit, this is precisely

one form of "public disclosure" anticipated by Congress in section 3730(e)(4)(A).

The Second, Third, and Tenth Circuits have opined as to what qualifies as a "public disclosure" and how widely disseminated the underlying information must be. *See Doe*, 960 F.2d 318; *Stinson*, 944 F.2d 1149; *MK-Ferguson*, 1996 WL 638479; *United States ex rel. Fine v. Advanced Sciences*, 1996 WL 638448 (10th Cir. Nov. 6, 1996). Generally, these circuits have "construed 'public' strictly to reach disclosures revealed to a single person, and even to reach information that has not been disclosed to the 'public,' but merely is accessible to the public." Robert Salcido, *Screening out Unworthy Whistleblower Actions: An Historical Analysis of The Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 Pub. Cont. L.J. 237, 238 (1995). The bright line rule adopted by the Second, Third and Tenth Circuits is both workable and textually warranted.

"Public disclosure" as defined by the False Claims Act is "a general phrase, not specifically limited by the enumerated examples in the remainder of the statute." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 736 F. Supp. 614, 621 (D.N.J. 1990), *aff'd*, 944 F.2d 1149 (3d Cir. 1991). As the Tenth Circuit recently stated:

> "[I]n order for the jurisdictional bar to apply, the allegations of fraud or fraudulent transactions must be contained in one of the forms, or be available from one of the sources, listed in section 3730(e)(4)(A). That section defines the sources of allegations and transactions which trigger the bar

> but it does not define the only means by which public disclosure can occur."

Advanced Sciences, 1996 WL 638448 at *4 (citations omitted); *see also*, *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994) (*Qui tam* actions are barred "when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain.").

As noted above, the natural reading of the text of the jurisdictional bar has led the Second, Third, and Tenth Circuits to conclude that a public disclosure occurs when information concerning the allegations or transactions is revealed to one or more persons who had no prior knowledge of the fraud. The "public disclosure" jurisdictional bar was designed to prohibit all suits "based upon allegations" of fraud that are accessible to "strangers to the fraud."

> Because *qui tam* plaintiffs ('relators') are entitled to a portion of the proceeds of successful suits, there is the potential for parasitic lawsuits by those who learn of the fraud through public channels and seek remuneration although they contributed nothing to the exposure of the fraud. To discourage such chicanery, Congress carefully crafted a jurisdictional bar to *qui tam* claims that are based on publicly disclosed information.

Doe, 960 F.2d at 319; *see Advanced Sciences*, 1996 WL 638448 at *1 ("[P]ublic disclosure occurs when the allegations of fraud or fraudulent transactions upon which the *qui tam* suit is based are affirmatively disclosed to

members of the public who are otherwise strangers to the fraud.").

Doe was a case in which investigators made "innocent employees," *i.e.* those not involved in the alleged fraud, aware of the alleged fraud. In holding that this amounted to "public disclosure," the court noted that because "the disclosure occurred in a combined criminal and administrative investigation, and because the administrative investigations are listed in the statute, the action is barred." *Doe*, 960 F.2d at 322-23. The Third and Tenth Circuits have held similarly. *Stinson*, 944 F.2d 1149; *MK-Ferguson*, 1996 WL 638479; *Advanced Sciences*, 1996 WL 638448. The holdings of all of these three courts of appeals, logical in themselves, are equally applicable to the investigative disclosure to uninvolved persons here.[2]

In *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990), the Second Circuit held that allegations of fraud are publicly disclosed when they are placed in the "public domain." *Id.* at 18 ("The fact that [the allegations of fraud] may not be widely disseminated does not inure to the benefit of a *qui tam* relator."). That is precisely what has occurred here, and it has occurred through means -- the disclosure of an administrative audit and investigation -- specifically described by Congress in crafting the jurisdictional bar to parasitic relators such as Respondent.

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[2] Even the dissent in *Doe* would apply the jurisdictional bar where the information was not actually in the hands of an innocent employee, but merely "generally accessible by the public." *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 325 (2d Cir. 1992) (Walker, J., dissenting).

A strict reading of the "public disclosure" bar satisfies the policy need that Congress intended to address. A whistleblower presents no advantage to the public when the transactions of which he would complain are already in the public domain. Once the government has been informed of an alleged fraud and has begun an "administrative investigation," public disclosure will likely occur, inasmuch as during the investigation, "strangers to the fraud" will learn of the underlying allegations and transactions.

However, in the event that the government does not pursue fraudulent conduct, the matter will not escape further public scrutiny. Notwithstanding public disclosure, a relator who is an original source of the information reported may proceed with a *qui tam* lawsuit. 31 U.S.C. § 3730(e)(4)(B). "*Qui tam* suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime. In such a scheme, there is little point in rewarding a second toot." *Wang*, 975 F.2d at 1419. If the relator would not have known the information without the public disclosure, he does not have "direct and independent knowledge" of the information. *Houck on Behalf of the United States v. Folding Carton Admin. Comm.*, 881 F.2d 494, 505 (7th Cir. 1989); *see also, Dick*, 912 F.2d at 18 ("[I]f the information on which a *qui tam* suit is based is in the public domain, and the *qui tam* plaintiff was not a source of that information, then the suit is barred").

C. The Ninth Circuit's Reasoning as to Public Disclosure is Illogical.

In rejecting the bright line rule of *Doe*, the Ninth Circuit opined that "[b]ecause the employee has a strong economic incentive to protect the information from

outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure." *Hughes*, 63 F.3d at 1518. The instant case demonstrates the illogic of this conclusion. We note at the outset that the FCA mandates protection to whistleblowers against retaliation by employers.[3] 31 U.S.C. § 3730(h). This provision permits awards of double back pay, along with interest and special damages, *id.*, over and above the 25 to 30% of the settlement or award the relator might receive if his suit were successful. 31 U.S.C. § 3730(d)(2).

Besides these protections, the financial incentives for employees and non-employees alike are so vast that it is no surprise that employees commonly bring *qui tam* cases. Indeed, the relator himself was a Hughes employee. In short, the steady rise in *qui tam* filings suggest no impediment, psychological or otherwise, to the bringing of such claims. In fiscal year 1987, just after the effective date of the 1986 amendments, only 33 *qui tam* suits were filed. This number has skyrocketed over 800 hundred percent. For example, in fiscal year 1995, the most recent year for which there are published data, relators filed 274 *qui tam* suits, and the number is growing. Stuart M. Gerson, *Issues and Developments in Qui Tam Suits Under the Federal False Claims Act*, *in* Citizen Suits and Qui Tam Actions: Private Enforcement of Public Policy 140 (1996) (citing U.S. Dep't of Justice Press Release, *Justice Department Recovers Over $1 Billion in Qui Tam Awards and Settlements* (Oct. 18, 1995)).

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[3] *Qui tam* suits are filed in camera, 31 U.S.C. § 3730(b)(2), and a relator may move the court to have his or her name remain under seal, as was the case in *Doe*, 960 F.2d 318.

Indeed, if there is any problem at all, it is that so many *qui tam* suits are being filed that the Department of Justice's Civil Division resources have been stretched to the breaking point. For example, six months prior to the enactment of the 1986 FCA amendments, Civil Division attorneys devoted approximately 1,100 hours on *qui tam* matters. In contrast, from January to June 1990, the Civil Division spent roughly 11,000 hours on *qui tam* matters. William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 Loy. L.A. L. Rev. 1799, 1840 (1996) (citation omitted). With the increasing number of *qui tam* cases filed since then, the investigative time has grown proportionately. This is explained not only by the explosion in the number of *qui tam* suits filed, but also the fact that the Department of Justice must investigate each suit to determine whether or not to join the relator. 31 U.S.C. § 3730(b).

Since the 1986 amendments through fiscal year 1995, when the Department of Justice intervened or settled FCA cases, recoveries of $1,058,177,552 have resulted. Yet, when the government has declined to intervene and the relator "goes it alone" the results have diminished considerably, recovering $15,597,141, approximately *one* percent of the total. *U.S. Dep't of Justice, Justice Department Recovers Over $1 Billion in Qui Tam Awards and Settlements* (Oct. 18, 1995). Inasmuch as a majority of these suits is deemed unmeritorious by the Department of Justice and rarely produces awards where the Department does not intervene, it is clear that if there is any problem at all, it is that the lucrative potential awards are encouraging too many, not too few, relators' actions. The Ninth Circuit's reasoning is contradicted by this fact.

D. A Bright Line Rule Regarding "Public Disclosure" Is Consistent with the Purpose of the FCA.

The 1986 amendments to the FCA were designed to encourage employees, former employees and other putative "whistleblowers" with inside knowledge to come forward with evidence of "false claims". *Overview of False Claims and Fraud Legislation: Hearing Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 12 (1986) (S. Hrg. 99-976) (statement of R. Willard, Asst. Att'y Gen.). At the same time, the 1986 amendments were carefully crafted to continue to prevent "parasitic" lawsuits of the kind that prompted the previously enacted 1943 amendments.

In order to limit actions to those individuals who could benefit the government because of their possession of first-hand knowledge of fraud, Congress enacted four jurisdictional bars, including the public disclosure bar at issue here. A strict reading of each of these bars is consistent with congressional intendment. However the vast number of unmeritorious *qui tam* actions, many of them brought by parasitic relators, suggest that judicial screening of such cases has been insufficiently stringent. This Court should adopt a bright line standard whereby "public disclosure" must be found to have occurred whenever any person unrelated to the fraud is informed of the activities that might give rise to an FCA suit. Any such individual is perfectly able to act as Congress intended relators to act. There is no useful distinction to be drawn, *e.g.*, between employee and non-employee relators, given the number of *qui tam* cases that are entering the federal courts. It is unduly burdensome to both defendants, a

statistical majority[4] of whom is nonculpable and to the courts themselves to engage in a broad-based, pretrial litigation over whether a particular kind of potential relator falls within or without the public disclosure bar.

The purpose of the FCA is met whether the disclosure reaches a small audience or a large one. "Indeed, an audience of one is sufficient because, as the Third Circuit pointed out in *Stinson*, that one person may disclose the information to many." Salcido, *supra*, at 265.[5] A restrictive interpretation of the "public disclosure" bar

> is consistent with practical considerations of judicial economy. It is one thing to expect the court to evaluate the quantity and quality of information in the public domain versus that possessed by the *qui tam* plaintiff after trial for purposes of fee determination; it is quite another to expect a similar evaluation as part of a pre-trial jurisdictional inquiry. This type pre-trial inquiry would be onerous, impractical and ultimately would serve neither the interests of the parties nor the court.

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[4] By the end of fiscal year 1994 (the most recent year for which there are published data on this statistic), 21 of the 455 *qui tam* cases the Department of Justice declined to pursue had resulted in a recovery. *Qui Tam Suits: Government Has Recovered $800 Million Through Whistle-blower Litigation*, BNA Fed. Cont. Daily, Nov. 10, 1994 at d4.

[5] Amicus notes with the growing use of computers, one person can disclose information to the entire world by posting it on the Internet.

United States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 551-52 (10th Cir. 1992).

It is hardly sensible for courts to hold on one hand that suits based on publicized, completed investigations are barred, but suits based on continuing investigations are permitted. Nor is it sensible to hold that a *qui tam* recovery could be allowed even where a case is under active negotiation and the government is about to get recovery in full, on its own. Instead, this Court should hold that trial courts should make early determinations as to whether a non-original source relator may proceed solely on the basis of whether the facts at issue have been disclosed to anyone not a party to the alleged fraud. All such persons are empowered to bring a *qui tam* action if there has not been public disclosure and this more than satisfies the congressional intent to encourage private anti-fraud litigation.

E. The Uncertain Constitutionality of FCA Actions Requires a Narrow Interpretation of *Qui Tam* Jurisdiction.

Although Amicus recognizes that the Court did not grant review on the constitutional questions presented, nevertheless, those questions should inform the Court as to the disposition to the statutory issues presented.

The clear congressional antipathy to parasitic claims itself suggests that *qui tam* jurisdiction should be closely cabined and, accordingly, that the public disclosure bar should be read strictly. In view of the serious constitutional problems surrounding a relator's separate maintenance of a case in the name of the United States, this Court should adopt the narrowest plausible interpretation of

qui tam jurisdiction. *Cf. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This Court, in other words, need not and must not construe the scope of the FCA's *qui tam* provisions in a constitutional vacuum.

Qui tam litigation may enjoy considerable historical precedent, *see Marcus*, 317 U.S. at 541 n.4, but the constitutional principles it seemingly contradicts are fundamental. Congress cannot delegate to private parties the power to enforce, in a nominal governmental capacity, the laws of the United States. That is a core power of the Executive Branch, and deeply-rooted separation-of-powers principles should prevent (or, here, starkly limit), the alienation of this power by the legislature.

The FCA "let[s] loose a posse of *ad hoc* deputies to uncover and prosecute frauds against the government." *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992). The Attorney General, who plays no role in appointing relators, cannot prevent a *qui tam* action from being filed. And, although the Attorney General has the right to intervene in an action, *see* 31 U.S.C. § 3730(b)(2), she can neither remove the relator nor apparently dismiss the action without court approval. *See id.* § 3730(c)(2). This case itself represents such an encroachment: the relator has continued to press it on behalf and in the name of the United States notwithstanding the Executive's conclusion that it is unwarranted.

A corollary to this general separation-of-powers point is that the FCA's *qui tam* provisions also raise serious questions under the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2. The maintenance of an FCA case is an

undoubtable exercise of significant governmental authority. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 124-27, 140 (1976) (*per curiam*). But *qui tam* relators are appointed by no one but themselves, and it is questionable that Congress, consistent with the Appointments Clause, should assign execution of the laws to such self-appointed officers. *Cf. Public Citizen v. Department of Justice*, 491 U.S. 440, 485-86 (1989) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, J., concurring).

It also is far from clear whether Congress can, consistent with the "case or controversy" requirement of Article III, confer standing on *qui tam* relators to litigate on behalf and in the name of the United States. The only conceivable "injury-in-fact" suffered by a qui tam relator is the loss of a statutory bounty created by Congress. Such an "injury," however does not satisfy the "irreducible constitutional minima" required by Article III. *Cf. Diamond v. Charles*, 476 U.S. 54, 69-71 (1986); *In re Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-59 (1868); *United States v. Morris*, 23 U.S. (10 Wheat.) 246 (1825); *Lujan*, 504 U.S. at 576-78. In this case, no one, the government itself included, has suffered economic injury (an independent reason for reversal, see *infra* at 23), but in no case such as this does a relator suffer such harm.

Historical reasons may be among those causing the Court to decline to consider a facial constitutional challenge to the validity of the *qui tam* amendments. However, in deciding the issues before it, we believe that the seeming constitutional anomaly of *qui tam* litigation requires constitutional prudence and restrictive textual interpretation of the reach of the amendments, especially as they relate to the parasitic suits which the Congress itself found unnecessary and objectionable.

F. The Rule of Lenity Also Requires a Narrow Reading of *Qui Tam* Jurisdiction.

The FCA is both a civil and criminal statute. 31 U.S.C. §§ 3729-32; 18 U.S.C. § 287. The "Rule of Lenity" requires that "ambiguous laws which impose penal sanctions are to be strictly construed against the Government." *United States v. Margiotta*, 688 F.2d 108, 120 (2d Cir. 1983). *United States v. Thompson/Center Arms*, 504 U.S. 505, 518 n.10 (1992); *see also*, *Crandon v. United States*, 494 U.S. 152, 168 (1990) (applying lenity in interpreting a criminal statute invoked in a civil action). "The doctrine of lenity is, of course, sound, for the citizen is entitled to fair notice of what sort of conduct may give rise to punishment." *McNally v. United States*, 483 U.S. 350, 374 (1987).

The FCA assesses a hefty liability: treble damages sustained by the Government, in addition to a $5,000 to $10,000 penalty for each false claim. 31 U.S.C. § 3729(a). The number of false claims submitted to the government can give rise to penalty assessments that overwhelmingly exceed the amount lost to the Treasury. Damages under the FCA are not solely based on the size of the claims submitted. They are also calculated on a per claim basis, even if the claim is never paid. *United States v. Bornstein*, 423 U.S. 303 (1976). Where, as here, the FCA is being used a punitive measure rather than a remedial one -- because there was no overpayment (because Hughes was entitled to the payments received) -- the Rule of Lenity applies.

In addition to draconian financial penalties, a government contractor may also face debarment or suspension from further government contracting. 10

U.S.C. § 2393(c) (1996); 48 C.F.R. § 9.403 (1995). In addition the contractor is debarred from serving as a subcontractor to a nondebarred prime contractor. 48 C.F.R. § 9.405 (1995). Debarment and suspension from one agency automatically extends to procurement activities with all other agencies. 48 C.F.R. §§ 9.406-1(c), 9.407-1(d) (1995). Thus, the penalties of FCA litigation are so severe, that the Rule of Lenity must require a narrow interpretation of who might bring such a suit in order that order that the consequences of a potential defendant's actions be predictable to him. Clearly, in the conduct of investigations and audits, and considering the advisability of self-disclosure that might lead to such a proceeding, a federal contractor ought to be able to participate candidly without the fear that a parasitic relator will expand its risk by bringing a civil action.

II. THIS ACTION SHOULD BE DISMISSED FOR WANT OF A CASE OR CONTROVERSY BECAUSE MERE TECHNICAL COST ACCOUNTING STANDARDS VIOLATIONS DO NOT INJURE THE PUBLIC FISC.

As we suggested in the previous argument, the literal terms of the statute, the clear congressional mandate to construe it restrictively as to parasites, the weight of constitutional doubt surrounding *qui tam* actions and the rule of lenity all mandate that the public disclosure bar of section 3730(e) be read restrictively. These same considerations, we submit, mandate reversal of the Ninth Circuit on the ground that there was no injury-in-fact in this case, not just to the relator, but to anyone. As the Ninth Circuit itself specifically held, the accounting procedures adopted by the company actually resulted in savings to the government. *Hughes*, 63 F.3d at 1516. That

should have ended the matter, but the Court went on to hold that there was a potential FCA violation in the fact that the accounting methods at issue were not timely disclosed. *Id.* at 1525. This holding violated both statutory and constitutional mandates and should be reversed. A false "statement," in and of itself, is not the equivalent of a false "claim," and it tortures the FCA to extend it this way.[6]

A. Respondent Has Not Satisfied the Article III Requirement of Injury-in-Fact.

Although the Constitution might not prohibit Congress from granting standing to a relator suing on behalf of the government to remedy an injury to the United States, *Marcus*, 317 U.S. 537, no plaintiff, including the government itself, who cannot demonstrate the constitutional minimum of injury-in-fact may maintain a lawsuit in federal court. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 488 n.24 (1982). It is "[t]he government, and not the relator, [who] must have suffered the 'injury-in-fact' required for Article III standing." *Milam*, 961 F.2d at 49. Given the Ninth Circuit's recognition that the conduct at issue saved the government money, its ultimate holding is inexplicable. Because the government cannot

[6] There are prohibitions against making false statements. *See* 18 U.S.C. § 1001 (1996). Congress could have included the making of mere false statements in the FCA's definitions, but it did not do so. *Cf.* 31 U.S.C. § 3279(a)(2).

meet the constitutional minimum of injury-in-fact here, neither can the relator.[7]

B. While the Issues Remaining Might Be Based Upon false Statements, They Are Not Derived From "Claims" Within the Meaning of the FCA.

"The False Claims Act was not designed to reach every kind of fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599 (1958). A claim for payment or approval "normally connotes a demand for money or for some transfer of public property." *United States v. Lawson*, 522 F. Supp. 746, 750 (D.N.J. 1981) (citing *McNinch*, 356 U.S. at 599).

The FCA defines "claim" to include

> any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other

[7] Although the Court limited its grant of *certiorari* to the statutory issues, including that related to the public fisc, while declining to consider a facial constitutional challenge to the *qui tam* provisions, the issue of standing as applied in a particular case is always reviewable by this Court because it is a jurisdictional question. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230 (1990).

> recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c). "[O]nly (i) 'actions which have the purpose and effect of causing the government to pay out money' where it is not due, or (ii) actions which intentionally deprive the government of money it is lawfully owed, are considered 'claims' within the meaning of the FCA." *United States ex rel. Windsor v. DynCorp, Inc.*, 895 F. Supp. 844, 850 (E.D. Va. 1995) (citations omitted). While "there is no requirement, statutory or judicial, that specific damages be shown," *Rex Trailer v. United States*, 350 U.S. 148, 152 (1956), an FCA claim must be derived from the presentation of "a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1).

This terminology clearly implies an act which either has secured or attempted to get payment. *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968). A mere false statement or non-disclosure cannot satisfy this definition. Thus, the Ninth Circuit's holding that Hughes might not have sufficiently disclosed[8] the terms of the commonality agreements, (Pet. *Cert.* at 20a, 24a), can not amount to a "claim," much less a false one. *Peterson v. Weinberger*, 508 F.2d 45, 52 (5th Cir. 1975) ("A claim is

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[8] We note that the Resident Auditor of the Defense Contract Audit Agency found (two years after the relator's original suit was filed) that "the cost allocation system adopted pursuant to Hughes' internal commonality agreements was disclosed to Northrop and the Air Force. Therefore, the contractor's claim for reimbursement of costs incurred on the B-2 radar contract is valid." (J.A. at 134.)

within the purview of the False Claims Act if it is grounded in fraud which might result in financial loss to the Government.").

The Ninth Circuit suggested that the alleged defects in Hughes's disclosure of its commonality accounting methods to Northrop and the Government "may" have rendered unspecified costs "unallowable" within the meaning of a federal regulation. *Hughes*, 63 F.3d at 1525. This purely procedural and immaterial alleged violation of the Cost Accounting Standards ("CAS") simply is not a "false claim" as intended under the FCA. To begin with, notwithstanding the alleged CAS violation, the administrative contracting officer found that Hughes was entitled to be paid for all of the costs that Hughes incurred. J.A. at 134. First, the decision of the Defense Contract Audit Agency ("DCAA") suggests that there were no such unallowable costs. "We concur with the contractor's claim for reimbursement of costs incurred for the design, development, fabrication, assembly, and testing of modules and components incorporated into the Analog Signal Converter and Radar Data Processor units for the B-2 radar system."[9] (J.A. at 134.)

Second, the disclosure, however complete or incomplete it might have been, could have been no more than a technical violation of the CAS. It was not a "claim" as it is defined by the FCA or as is commonly understood.

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[9] The government audit only determined that Hughes's practices were not disclosed in a timely fashion, and "therefore not in compliance with its disclosure statement." (Pet. *Cert.* at 66a.) But, because the noncompliance did not have a "significant cost impact," it was found to be "not material." *Id.*

"Logically, then, any claims for payment based on work that satisfied [Hughes's] contractual obligations to the AF could not have been 'false or fraudulent' within the meaning of the FCA." *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1412 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1319 (1996). This is because "a determination by a contracting officer that a cost is allowable, combined with payment of that cost, binds the government so that no challenge to the allowability of the cost can be maintained." J. Cibinic & R. Nash, *Cost-Reimbursement Contracting* 1106 (2d ed. 1993); *see United States v. TDC Management Corp.*, 24 F.3d 292 (D.C. Cir. 1994).

Whether as a matter simple literal construction or of strict interpretation, in view of potential constitutional issues, or the Rule of Lenity, the Court should not transmogrify technical violations of complicated government regulations into a false "claim." The FCA should only apply to those whose conduct is "sufficiently culpable to justify the formidable remedies enacted by Congress in its efforts to minimize procurement fraud." Allan J. Joseph *et al.*, *Update: Defective Pricing - When Is It Defective? When Is It Fraud?*, 54 Fed. Cont. Rept. (BNA) 136 (July 30, 1990). This is particularly true with *qui tam* suits where "[f]aulty diagnoses of observed behavior are inescapable given the complexity and murkiness of the regulatory commands controlling government contractors. . . . Relators may be particularly prone to misapprehend the legal significance of contractor efforts to comply with the government's complex cost allocation and accounting conventions." Kovacic, *supra*, at 1831-32 (footnotes omitted).

The standards for government contracting, such as the CAS, are such that "Congress, agency regulators, courts and Boards have been unable to define [them] with precision." Joseph, *supra*, at 136. Especially considering the financial and debarment risks posed to contractors by the FCA, "claim" must be read to exclude merely technical violations of complex regulations, so that the lack of precision in defining the regulations will not give rise to liability to unknowing government contractors.

Hughes's untimely disclosure, which did *not* lead to any "unallowable" costs, is analogous to a government contractor's not submitting payroll reports in a timely fashion. In considering such conduct under the FCA in the *Windsor* case, the district court found that there was "simply no falsity, no misrepresentation, in a contractor's failure to submit required payroll reports or to do so in a timely fashion. . . . Moreover, a contractor's failure to submit payroll reports, in and of itself, causes no economic loss to the government and is not a 'claim' within the meaning of the FCA." 895 F. Supp. at 850. That court provided an example for illustration that is instructive in this case:

> [C]onsider, for example, a situation where the workers were paid properly, but DynCorp failed to submit the required documentation. In that event, there would certainly be no false claim for payment, despite the reporting violation. This example demonstrates that the mere failure to submit required payroll reports, without more, does not subject the delinquent contractor to FCA liability. There is simply no logical nexus

> between the failure to submit reports, by itself, and economic injury to the government.

Id.

The Ninth Circuit missed this point and ignored the constitutional mandate that a federal lawsuit must be predicated upon a true case or controversy, which itself requires injury-in-fact. *Valley Forge*, 454 U.S. at 488 n.24. There was no such injury here and so there was no "claim" upon which to base relief under the FCA. The complaint should be dismissed.

CONCLUSION

For these reasons, the judgment of the Ninth Circuit should be reversed, and this action should be remanded with instructions that the complaint should be dismissed because the public disclosure bar of the FCA precludes the action and because the relator has not set forth a "claim" within the meaning of the FCA.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY
Petitioner,

VS.

UNITED STATES EX REL. WILLIAM J. SCHUMER
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FMC CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER HUGHES AIRCRAFT COMPANY

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BRIEF OF FMC CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER HUGHES AIRCRAFT COMPANY

Pursuant to Supreme Court Rule 37.3, *amicus curiae* FMC Corporation ("FMC") urges the Court to reverse the Ninth Circuit's ruling in *United States ex rel. Schumer v. Hughes Aircraft Co.* This brief addresses solely whether the 1986 repeal of the Government knowledge defense, 31 U.S.C. § 3730(b)(4) (1982), can be applied retrospectively to suits alleging violations of the False Claims Act that occurred before the repeal. This brief is filed with the consent of both Petitioner and Respondent.

INTEREST OF THE *AMICUS CURIAE*

FMC Corporation is a publicly traded corporation that manages a diverse portfolio of businesses that includes the design and production of armored vehicles and related

supplies. Since 1942, except for a break between World War II and the Korean War, FMC's factories have continuously produced armored vehicles for the United States military. During that time, FMC has been awarded the contracts to produce evolving versions of the Army's main armored personnel carrier and the Marine Corps' primary armored amphibious vehicle. Today, through United Defense LP, a partnership between FMC and Harsco/BMY, FMC builds, among other vehicles, the Bradley Fighting Vehicle, the M113 armored personnel carrier, and the Marine Corps' P7 amphibious vehicle.

On September 9, 1986, FMC engineering test analyst Henry J. Boisvert, who had been recently laid off, filed a *qui tam* lawsuit against FMC alleging violations of the False Claims Act related to the production of the Bradley Fighting Vehicle. *United States ex rel. Boisvert v. FMC Corp.*, No. C-86-20613 WAI (N.D. Cal.). On October 27, 1986, while the Justice Department was investigating Mr. Boisvert's allegations, the Government knowledge defense to such lawsuits was repealed by the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 ("the 1986 Amendments"). After the Justice Department declined to join Mr. Boisvert's suit, FMC brought a motion to determine that the Government knowledge defense applied to the *Boisvert* case, notwithstanding its repeal. The District Court ruled that the defense applied because its elimination by the 1986 Amendments impaired FMC's substantive rights. *United States ex rel. Boisvert v. FMC Corp.*, No. C-86-20613 WAI, 1987 U.S. Dist. LEXIS 13549 (N.D. Cal. Sept. 8, 1987). The District Court later applied the Government knowledge defense to dismiss twenty-one of the thirty-two alleged false claims. Several years later, the Ninth Circuit decided *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512 (9th Cir. 1995), and *Hyatt v. Northrop Corp.*, 80 F.3d 1425 (9th Cir. 1996), *petition for cert. filed* (U.S. July 2, 1996)

(No. 96-17). Based on *Schumer* and *Hyatt*, Mr. Boisvert has moved to reinstate fifteen of the twenty-one allegations previously dismissed.

Unless the Court reverses *Schumer* or *Hyatt*, FMC and other Government contractors face the prospect of mounting, at great cost, a substantive defense to allegations which would have been dismissed on Government knowledge grounds. FMC submits this *amicus* brief to bring to the Court's attention the practical impact of the repeal of the Government knowledge defense.

SUMMARY OF THE ARGUMENT

In *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994), the Court established the criteria for determining when, in the absence of clear legislative direction,[1] a statute may be applied retroactively to conduct that took place before its enactment. FMC's *amicus* brief demonstrates that, in the context of Government contracts, the Government knowledge defense provided an important and reliable shield for contractors to avoid *qui tam* actions by unhappy employees and strangers to the Government contracting process. In setting forth the test in *Landgraf*, the Court stated that each case requires a particularized analysis to examine "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event," noting that "familiar considerations of fair notice, reasonable reliance and settled expectations offer sound guidance." *Id.* at 1499. But, in *Schumer*, the Ninth Circuit ignored this direction and guidance. The court completely failed to take account of the

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1. Neither the language of the statute nor congressional intent supports retroactive application of the 1986 Amendments. *See United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1517 (9th Cir. 1995); *United States v. Murphy*, 937 F.2d 1032, 1037 (6th Cir. 1991).

vast difference to a Government contractor between dealing with the Government with respect to problems that arise in the course of performing complex Government contracts, and dealing with a relator as to those problems.

Before October 1986, a business such as FMC which contracted with the United States Government could rely on its close cooperation with the Government to protect it from *qui tam* False Claims Act suits. Government contractors gave Government inspectors and administrators wide ranging access to the daily operations of their programs, well beyond the access given to commercial customers. In return, a Government contractor could be assured that any problem would be resolved by someone familiar with both the broad context and the narrow details of the program -- and, even more significantly, with the flexibility to apply the appropriate remedies to fix the problem. If a relator did bring suit, the contractor could easily dispose of it by presenting evidence that the Government already possessed the information upon which the suit was based. This defense provided strong protection to Government contractors from strike suits, and allowed the Government to control the resolution of disputes over false claims that arose during the normal day to day administration of Government contracts.

When Congress amended the False Claims Act in October 1986, this protection against strike suits evaporated for both contractors and the Government. After October 1986, Government contractors were forced to spend millions of dollars defending against *qui tam* suits which the Justice Department decided did not merit intervention -- the vast majority of which turn out to be groundless.

Into this stark reality the Ninth Circuit has introduced the fanciful myth that the Government knowledge defense had no effect on the substantive rights of Government contractors. Careful analysis shows that eliminating the Government

knowledge defense for conduct that took place before the 1986 Amendments would have impermissibly retroactive effect under *Landgraf*. The repeal of this defense by the 1986 Amendments did in fact "attach new legal consequences to events completed before its enactment," because it impaired rights that contractors had when they acted and increased contractor's liability for past conduct. 114 S. Ct. at 1499 and 1505. The repeal took away a total defense against *qui tam* suits.

Relators have attempted to confer retroactive effect on the repeal of the defense by referring to language in *Landgraf* which exempted jurisdictional statutes from the traditional presumption against retroactivity. Although the Government knowledge defense was at one time labeled jurisdictional,[2] it never was jurisdictional in practice because it did not govern the power of a court to hear a False Claims Act case. Thus, *Landgraf*'s traditional presumption requires prospective application of the 1986 provision repealing the defense.

Based on the serious substantive change to the Government contracting environment rendered by the repeal of the Govegnment knowledge defense, FMC urges that the Court rule in favor of the petitioner in this case and reverse the Ninth Circuit opinion. FMC also joins Northrop Grumman in requesting that the Court reverse *Northrop Grumman v. United States ex rel. Hyatt, petition for cert. filed* July 1, 1996 (No. 96-17), or grant, vacate and remand *Hyatt* to the Ninth Circuit to reconsider the retroactive effect in cases filed *before* the 1986 Amendments.

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2. As demonstrated in Section V below, during the relevant period in the *Schumer* case the statute did not even bear the jurisdictional label.

ARGUMENT

I. Under the Government Knowledge Defense, the Systematic Release of Information to the Government As Part of Regular Contract Administration Protected Government Contractors from Strike Suits

The Ninth Circuit in *Schumer* failed to consider the actual real-world effect of the prior Government knowledge defense in the context of Government contracts. Government contractors must do business with a sovereign that has regulatory and criminal enforcement powers to supplement its power to contract. Frequently, and especially in the defense industry, the Government also bargains from the strength of being the sole customer. The Government has used this power to insert into its contracts more detailed and onerous oversight provisions than encountered in private transactions, and to require compliance with social and policy provisions that would not be accepted in transactions between private parties.[3] The sheer number of provisions creates a great risk in a complex development project of being out of compliance with at least some of them. With the False Claims Act added to that mix, doing business with the United States involves significant risk. That risk threatens "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transaction of its agencies." *United States v. Winstar*, 116 S. Ct. 2432, 2459 (1996).

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3. The Federal Acquisition Streamlining Act of 1994 is a recent attempt to reduce over-regulation in Government contracts. Its legislative history provides an informative summary of the difficulties Government contractors face in doing business with the United States. *See* S. REP. No. 258, 103rd Cong., 2d Sess. 2-3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2561, 2562-63; S. REP. No. 259, 103rd Cong., 2d Sess. 1-3, 5-6 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2598, 2598-603.

To reduce that risk, Government contractors systematically and continuously inform the Government of every step during the normal course of contract administration -- and the Government responds. Appellate opinions in *qui tam* cases repeatedly describe this reciprocal information flow. For example, in *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321 (9th Cir. 1995), the relator alleged deficiencies in the contractor's testing of the Apache helicopter. The facts of that case showed, however, that the Government knew as much as the contractor did about the alleged problems. In affirming summary judgment for the contractor on the merits, the Ninth Circuit described how, before conducting tests, Hughes Helicopter had submitted its test plans to the Army, Army technical representatives had witnessed the tests and reviewed flight test reports, and Army representatives had attended pre- and post-test briefings. The Ninth Circuit concluded that the Army was always aware of problems that arose before acceptance of each helicopter. *Id.* at 324. The court quoted at length the following District Court finding:

> [t]he overwhelming evidence established a pattern of cooperation between the Army and [the contractor] during the course of a complicated, sophisticated, and highly technical military procurement program. The evidence established that information flowed freely between [the contractor] and the Army concerning the testing of the Subsystems, including information regarding deviation from Test Plans, failures to pass tests, and difficulties with some of the Subsystems. The evidence established that all information upon which [Butler] bases his case was not only available to the Army, but in the Army's possession.

Id. at 326.

The elaborate exchange of information inherent in the close working relationship between contractors and the Government was also evident in the joint effort of FMC and the Army to design and build the Bradley Fighting Vehicle. In another case involving the Bradley program, the Ninth Circuit described what occurred on one engineering project:

> The government knew of all the deficiencies identified by Wang, and discussed them with FMC. The fact that the government knew of FMC's mistakes and limitations, and that FMC was open with the government about them, suggests that while FMC might have been groping for solutions, it was not cheating the government in the effort.

Wang v. FMC Corp., 975 F.2d 1412, 1421 (9th Cir. 1992).

This intimate Army-FMC cooperation also persuaded the District Court in *Boisvert* to dismiss two-thirds of the relator's allegations based on Government knowledge during the Bradley's development and testing. The Army maintained a large staff at FMC's San Jose facility to implement its power to approve each step of the design and to oversee detailed inspection and testing on every Bradley that was delivered. The level of communication between FMC and the Army was evidently not apparent to Mr. Boisvert, a test analyst with no managerial responsibilities. The Justice Department examined the validity of Mr. Boisvert's allegations and chose not to support them. Once that had occurred, the existence of the Government knowledge defense in the Government contracting environment gave FMC the fair expectation that its programmatic cooperation with the Government would cut off a suit by the relator on the same allegations.[4]

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4. Other cases demonstrate that the systematic release of information to the Government was the norm for Government contractors. *See United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1516 (9th Cir. 1995) (Government learned of commonality agreements when contractor informed and secured the approval of the Air Force); *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1405-06 (9th Cir. 1995) (Government acquired the information that would have satisfied the Government knowledge defense through normal quality control audits); *United States ex rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196 (D.C. Cir. 1995) (relator received information on which he based his suit as the Government official responsible for overseeing the contract at issue); *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 816 (9th Cir. 1995) (Government received information showing no false claim during contractor's year and a half effort to bring its switches up to a level of performance satisfactory to the Army).

Thus, prior to the 1986 Amendments, Government contractors reasonably expected that exchanges of information inherent in normal contract administration would protect them from *qui tam* litigation on claims not serious enough to require Justice Department intervention. This expectation creates a right to the Government knowledge defense that would be impaired by retrospective application of its repeal. "Familiar considerations of fair notice, reasonable reliance and settled expectations," *Landgraf*, 114 S. Ct. at 1505, require that the Government knowledge defense continue to protect Government contractors' pre-Amendment conduct.

II. The Repeal of the Government Knowledge Defense Increased Government Contractors' Liability for Conduct Before the Repeal by Increasing Both the Number of Meritless Suits and the Cost of Defending Them

The repeal of the Government knowledge defense forces Government contractors to defend on the merits increasing numbers of groundless cases relating to conduct that occurred

prior to the 1986 repeal. As a rule, if the Justice Department evaluates a *qui tam* case as meritless or not worth pursuing, it does not seek dismissal. Instead, it simply declines to intervene, and this permits the relator to go forward with the case. If the Government knowledge defense does not apply, Government contractors must litigate such meritless cases through summary judgment or trial, after extensive discovery on the merits of the relator's allegation. The contractor must make a systematic presentation of evidence about the context of the Government contracting process to convince a judge or jury that the contractor's conduct was not a false claim. The proof must be even more detailed if the contractor's product experienced performance or design problems that the contractor fixed with the Government in a mutually acceptable resolution of the problem. During the time that Government contractors enjoyed the protection of the Government knowledge defense, they experienced none of this extra effort, expense, and risk.

United States ex rel. Butler v. Hughes Helicopters, Inc., 71 F.3d 321 (9th Cir. 1995), is a powerful example of the kind of additional burden that the 1986 Amendments placed upon Government contractors. The Ninth Circuit agreed with the District Court that the Government possessed the relevant information about the relator's allegations so that the contractor would have qualified for the Government knowledge defense if the pre-Amendment False Claims Act were applied. *Id.* at 326. However, the contractor was required to go through full pre-trial litigation and discovery and ten days of jury trial before the District Court rendered a directed verdict in its favor. *Id.* at 323. Other recent *qui tam* cases to which the Government knowledge has not been applied also required extensive discovery and summary judgment or trial. *See Wang*, 975 F.2d at 1415 ("significant amount of discovery" with the production of "thousands of documents"; summary judgment for contractor); *Anderson*, 52

F.3d at 810, 812 (appeal not heard until four years of litigation; summary judgment for contractor); *Lindenthal*, 61 F.3d at 1405 (contractor sought $200,000 in costs alone and was awarded $50,271.27; bench trial for contractor on merits); *Schumer*, 63 F.3d at 1516, 1526 (three years of litigation before the close of summary judgment briefing; summary judgment for contractor).[5]

Requiring Government contractors to fully litigate meritless suits based on events that occurred before October 1986 increases the contractors' monetary liability for conduct that occurred before the enactment of the 1986 Amendments. The ability to dismiss a groundless allegation before detailed discovery and without the uncertainty of a jury trial is of significant practical value to Government contractors. The volume of increased resources that must be committed to defending suits that were groundless from the beginning makes retrospective application of the repeal of the Government knowledge defense impermissibly retroactive.

III. Repealing the Government Knowledge Defense for Government Contractors' Conduct That Occurred Before the Amendments Would Eliminate a Material Defense

Repeal of the Government knowledge defense impaired contractors' substantive right to a complete defense against

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5. The impact of the Government knowledge defense on meritless cases is also reflected in the Ninth Circuit's two *Hagood* opinions. In *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991), the complaint itself pleaded that the Government knew about the alleged false claim. The Ninth Circuit overturned the District Court's ruling that Mr. Hagood's complaint failed to state a claim upon which relief could be granted. The defendant was then compelled to engage in five more years of litigation, until *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465 (9th Cir. 1996) upheld summary judgment on the merits of the same complaint.

relators. *Winfree v. Northern Pacific Ry. Co.*, 227 U.S. 296 (1913), prohibits retrospective application of the repeal of a defense, even if the defendant might have been otherwise liable. In *Winfree*, a railroad employee was killed, allegedly through the negligence of the defendant railway. The plaintiff was the administrator of the employee's estate. He sought relief under a federal statute enacted after the employee's death allowing suits by the administrator of the deceased employee's estate. *Id.* at 300-01. Under state law, the employee's father could also have brought a cause of action for the railroad's negligence, even before the federal statute was enacted. *Id.* at 302. The Court agreed with the argument that "there was liability on the part of the defendant for its negligence before the passage of the act of Congress, and the act has only given a more efficient and a more complete remedy." *Id.* at 301-02. Nevertheless, the Court refused to allow the administrator's action, because the statute "takes away material defenses, -- defenses which did something more than resist the remedy; they disproved the right of action." *Id.* at 302.

Winfree is a direct parallel to the situation in *Schumer*. In *Winfree*, the railroad's defense against an action by its employee's administrator was abolished by statute, although the railroad could have been sued by the employee's father. In *Schumer*, Hughes' defense against an action by a relator was abolished by the 1986 Amendments, although Hughes could have been sued by the Government. In each case, the abolition of a complete defense as to certain parties was not mitigated by the defendant's continuing liability to other parties. In *Winfree*, this Court held that a statute which discontinued a material defense to liability as to certain parties may not be applied retroactively to conduct committed prior to its enactment. This Court should reach the same result now in *Schumer*. Both cases recognize the real world truth that protection from liability to certain -- even if not all -- parties

is a valuable right. Therefore, under *Landgraf* retroactive application of the removal of that right is impermissible.

IV. The Repeal of the Government Knowledge Defense Increased the Likelihood that Government Contractors Would Face False Claims Act Liability, Rather than Less Serious Remedies Available to the Government

The Ninth Circuit's decision in *Schumer* is based on the assumption that the action brought by the relator could have been initiated by the Government. *See* 63 F.3d at 1517. This assumption fails to take account of the different remedies available to the Government as opposed to a *qui tam* relator. Even when the Government determines that it is entitled to some relief, the Government is not limited to the False Claims Act. It can proceed either under the relevant contract or select a remedy from the broad range of statutes that control the conduct of Government contractors. For example, the Government might choose to negotiate an adjustment to the contract, initiate a claim under the Contract Disputes Act, 41 U.S.C. §§ 601-13 (1988), seek a price adjustment under the Truth in Negotiations Act, 10 U.S.C. § 2306a, 41 U.S.C. § 254(d) (1992), or even seek administrative recovery under the Program Fraud Civil Remedies Act, 31 U.S.C. § 3801-12 (1992). Each of these provides a remedy significantly less onerous than prescribed by the False Claims Act. By contrast, a relator has available only the False Claims Act with its harsh remedies of multiple damages plus penalties. Thus, even if a relator concludes that the defendant's conduct may not involve fraud, the relator's only choice is to pursue the False Claims Act action or abandon it.

From the contractor's perspective, the difference in available remedies is striking. The contractor can assume that the government will tailor the remedy it seeks to the particular conduct, taking into account all the information it has learned

during the course of contract performance. The relator, on the other hand, with only the False Claims Act tool, will not be able to make such fine distinctions.

Prior to 1986, if the Government chose a remedy other than the False Claims Act, the Government knowledge defense would assure that a *qui tam* action relating to the same subject matter would be immediately dismissed. The contractor would thereby avoid False Claims Act liability entirely -- though not, perhaps, lesser liability to the Government under a more appropriate statute. Since the repeal of the Government knowledge defense increased the likelihood that Government contractors would face the more strenuous False Claims Act liability, under *Landgraf* the 1986 Amendments can be applied only prospectively.

V. The Pre-amendment Government Knowledge Defense Was Not a Jurisdictional Provision

In deciding that the 1986 Amendments could be applied to pre-amendment conduct, the Ninth Circuit looked at the label attached to the Government knowledge defense, but not at the substantive impact of the defense. But the Government knowledge defense was not jurisdictional in the sense described in *Landgraf*. In discussing a jurisdictional exception to the presumption of prospective application of new statutes, *Landgraf* referred to statutes that "speak to the power of the court rather than to the rights or obligations of the parties." 114 S. Ct. at 1502 (quoting *Republic National Bank v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring). The Court also noted that a new jurisdictional rule normally "takes away no substantive right but simply changes the tribunal that is to hear the case." *Id.* The Government knowledge defense does not determine which court can hear a False Claims Act case. *See United States ex rel. Fallon v.*

Accudyne Corp., 97 F.3d 937, 940-41 (7th Cir. 1996). That defense completely barred a relator's action in any forum.

Even if the label "jurisdictional" were controlling, it would not apply here. The text of the Government knowledge defense contained no reference to jurisdiction at all at the time the conduct in *Schumer*, *Hyatt*, and *Boisvert* took place. In 1982, the reference to jurisdiction in the Government knowledge defense was deleted when the defense was amended to read:

> [u]nless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

31 U.S.C. § 3730(b)(4) (1983).[6] This change was made as part of a recodification of the entire Title 31 of the United States Code, Pub. L. 97-258, 96 Stat. 877 (1982), and remained in place until the 1986 Amendments. The House Report accompanying that recodification stated that Congress intended to "restate in comprehensive form, without substantive change" the previous code sections, and to substitute "simple language" for "awkward and obsolete terms." H.R. REP. NO. 651, 97th Cong., 2d Sess. 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895. The revision notes for the new section 3730(b)(4) state that the reference to jurisdiction was dropped "to eliminate unnecessary words."

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6. The 1943 version of the False Claims Act had read:

> [t]he court shall have no jurisdiction to proceed with any [*qui tam*] suit . . . whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.

31 U.S.C. § 232(C) (1976).

Id. at 2039. For these reasons, the term "jurisdiction" in the Government knowledge defense should not be meaningful in an analysis of its retroactivity.

VI. Even If the Court Determines That the 1986 Amendments May Be Applied Retroactively on the Facts of *Schumer*, the Court Should Grant, Vacate, and Remand *Hyatt* for the Ninth Circuit to Address the Circumstance Where the Suit Was Filed Before the Amendments

FMC asks the Court to follow the suggestion of the Northrop Grumman reply brief in its petition for *certiorari* in *Hyatt*, and grant, vacate and remand that case for the Ninth Circuit to reconsider retroactivity in the situation in which a suit was filed before the 1986 Amendments. *Boisvert* was also filed before the effective date of those amendments, so the arguments in *Hyatt* apply to FMC's case as well.

CONCLUSION

The Ninth Circuit's holding that the 1986 Amendments to the False Claims Act may have retroactive effect in *United States ex rel. Schumer v. Hughes Aircraft Co.* should be reversed.

Dated: November 27, 1996

Respectfully submitted,

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Supreme Court of the United States

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HUGHES AIRCRAFT COMPANY,
Petitioner,

v.

UNITED STATES *ex rel.* WILLIAM J. SCHUMER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ELECTRONIC INDUSTRIES ASSOCIATION, NATIONAL SECURITY INDUSTRIAL ASSOCIATION, AND SHIPBUILDERS COUNCIL OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ELECTRONIC INDUSTRIES ASSOCIATION, NATIONAL SECURITY INDUSTRIAL ASSOCIATION, AND SHIPBUILDERS COUNCIL OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

The Chamber of Commerce of the United States of America is the nation's largest federation of business organizations and individuals, representing approximately 215,000 companies, many of which provide goods and services to the United States under government contracts. The Electronic Industries Association is a national organization of more than 1200 companies involved in the development and production of televisions, radios, computers, telecommun-

ications devices, radars, avionics, and other military and commercial electronic equipment. The National Security Industrial Association is a national organization of approximately 300 manufacturing, research, and service companies from all segments of industry that provide goods and services in support of the national security needs of the United States. The Shipbuilders Council of America is a trade association that promotes a sound private shipbuilding and ship-repair industry in the United States.

Amici's members annually perform billions of dollars of work for government agencies pursuant to thousands of contracts. This work exposes amici's members to the possibility of suits initiated by private individuals pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. §§ 3729-3733. Accordingly, amici have a strong interest in the questions presented in this case. In the interest of brevity, amici address only some of the questions presented, relying entirely on petitioner's and other amici's discussion of other questions.

Both petitioner and respondent have consented to the filing of this brief, and letters reflecting these consents have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

A. The history of the civil False Claims Act demonstrates that liability is imposed only upon conduct that may cause the government financial injury. The Act was enacted in 1863 to stop the "plundering of the public treasury" and "was not designed to reach every kind of fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599 (1958). This Court consistently has regarded the Act as directed at false claims for federal money or property. *Id.*; *United States v. Cohn*, 270 U.S. 339, 345-46 (1926). As the Court determined in *United States v.*

Neifert-White Company, 390 U.S. 228, 233 (1968), the Act reaches "all fraudulent attempts to cause the Government to pay out sums of money."

In 1986, when Congress revised the civil False Claims Act for virtually the first time since its enactment, Congress specifically defined "claim" as meaning a "request or demand . . . for money or property." 31 U.S.C. § 3729(c). This definition confirmed the Court's interpretation that the Act was directed at financial injury to the government. Congress "strongly endors[ed]" the Court's holding that the Act "'was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" S. Rep. No. 345, 99th Cong., 2d Sess. 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5284 (quoting *Neifert-White*, 390 U.S. at 232).

That the Act imposes no civil liability for non-financial frauds is forcefully shown by Congress's extension of the *false statements* provision in the criminal False Claims Act to reach non-financial frauds. By this extension, Congress "sever[ed] the historical link with the false claims portion of the statute" and left untouched the civil and criminal provisions related to financial fraud. *Hubbard v. United States*, 115 S. Ct. 1754, 1760 (1995).

In this case, there was no false claim for money or property. All that occurred was that Hughes failed to file a timely Cost Accounting Standards Disclosure Statement as required by its contract and the applicable regulations. This run-of-the-mill violation was not associated with any claim for payment. Moreover, it did not threaten or cause financial harm to the government. To the contrary, the untimely disclosed accounting practice saved the government money. The Ninth Circuit nonetheless ruled that the nondisclosure could result in a false claim within the meaning of the False

Claims Act. *See* Pet. App. 25a. This unnatural interpretation, imposing severe penalties for run-of-the-mill violations that cause the government no harm, is contrary to the plain language of the Act, its legislative history, and this Court's decisions.

B. The "public disclosure" provision, 31 U.S.C. § 3730(e)(4)(A), which was instituted in the 1986 amendments, cannot be applied retrospectively, since it "permits recovery, in cases where recovery could not be had before, and takes from the defendant defenses which formerly were available." *Winfree v. Northern Pac. Ry. Co.*, 227 U.S. 296, 302 (1913). Although this provision is couched in jurisdictional terms, its effect on the substantive rights of defendants warrants application of the "default rule" that statutes not be given retroactive application. *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 1501 (1994).

C. The "public disclosure" provision bars qui tam actions that are "based upon the public disclosure of allegations" in an "administrative . . . audit." 31 U.S.C. § 3730(e)(4)(A). In this case, the government disclosed the alleged frauds in the course of an administrative audit to innocent Hughes employees, as well as to employees of another company, before the qui tam action was filed. Although the statute does not define the term "public disclosure," that term surely encompasses disclosures, like those made in this case, to persons who were strangers to the alleged frauds. The Court should reject the baseless ruling of the Ninth Circuit that disclosures to employees of defense contractors are "private" rather than "public" in nature.

ARGUMENT

I. THREATENED OR ACTUAL FINANCIAL HARM TO THE GOVERNMENT IS AN ESSENTIAL ELEMENT OF A FALSE CLAIM UNDER THE FALSE CLAIMS ACT.

A. Since its Inception, the False Claims Act Has Operated to Prevent Injury to the Federal Treasury.

Congress enacted the False Claims Act in 1863 "after disclosure of widespread fraud against the Government during the War Between the States." *Rainwater v. United States*, 356 U.S. 590, 592 (1958). "Testimony before Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war." *United States v. McNinch*, 356 U.S. 595, 599 (1958). To "stop this plundering of the public treasury," *id.*, and to "protect the funds and property of the Government from fraudulent claims," *Rainwater*, 356 U.S. at 592, Congress made it a criminal and civil offense for any person to "present or cause to be presented for payment or approval . . . any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent." Act of March 2, 1863, ch. 67, § 1, 12 Stat. 696. The 1863 Act also proscribed ancillary means of putting the government's money at risk. Thus, in what is known as the false statements provision, the Act prohibited the use of any "false or fraudulent statement or entry" in securing "the approval or payment of such claim." *Id.*, 12 Stat. at 696-97.

Congress made only "minor" changes to the Act in the following years. *Hubbard v. United States*, 115 S. Ct. 1754,

1760 n.8 (1995). When Congress rearranged the existing body of statutes by subject matter in 1873, it separated the 1863 Act containing both criminal and civil provisions into two separate sections of the Revised Statutes. Section 5438 contained the criminal sanctions, and Section 3490 contained the civil penalties. *See* Revised Statutes, 18 Stat. 5438, 3490. The civil section did not list the prohibited acts. It simply provided for double damages and a $2000 forfeiture for "any of the acts prohibited by any of the provisions of section [5438]" of the Revised Statutes. These provisions formed the official text of the civil False Claims Act until Congress enacted Title 31 of the U.S. Code as positive law and repealed section 3490 in 1982. Act of Sept. 13, 1982, chs. 1 & 37, §§ 3729-3731, 96 Stat. 877, 978-79; *see United States v. Bornstein*, 423 U.S. 303, 305 n.1 (1976).

B. This Court's Rulings Have Consistently Affirmed That the False Claims Act Imposes Liability Only Upon Conduct That Poses a Threat to Federal Funds.

The Court determined in *United States v. Cohn*, 270 U.S. 339 (1926), the kinds of claims that can give rise to False Claims Act liability. Although *Cohn* arose under the criminal provisions of the False Claims Act, it constitutes an essential building block in the construction of "claim" in the civil False Claims Act because the words construed in *Cohn* – "claim upon or against" the government – came directly from Revised Statute § 5438, which by cross-reference also described the conduct that gave rise to civil liability until the 1982 amendment. *See McNinch*, 356 U.S. at 600 n.10.

In *Cohn*, the Court defined "claim" to require a threat to the government's money or property, based on the government's own liability to the claimant, and it explicitly left outside the statute conduct that did not pose any threat of

injury to federal money or property, even if the purported claimant lied to the government. 270 U.S. at 345-46. Cohn was indicted for wrongfully gaining possession of merchandise held in customs. Because the Government laid no claim to the merchandise, Cohn's false statements could not "bilk the Government out of money or property." *Hubbard*, 115 S. Ct. at 1760. The Court determined that the requirement of a

> 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based on the Government's own liability to the claimant.

Cohn, 270 U.S. at 345-46. Similarly, the use of the word "defraud" throughout the statute referred to "the wrongful obtaining of money and other property of the Government." *Id.* at 347. Accordingly, the Court concluded that Cohn did not fall within the reach of the statute.

In *McNinch*, the Court reiterated that "'the conception of a claim against the government normally connotes a demand for money or for some transfer of public property.'" 356 U.S. at 599 (quoting *United States v. Tieger*, 234 F.2d 589, 591 (3d Cir. 1956)). Three individuals made false statements to a private bank to secure a federally-insured loan. After reviewing the language and history of the Act, the Court determined that such conduct fell outside of the civil statute. The statute was intended to crack down on "plundering of the public treasury" and "was not designed to reach every kind of fraud practiced on the Government." *Id.* Accordingly, the false loan application in *McNinch* did not constitute a false "claim" under the statute.

In *United States v. Neifert-White Company*, 390 U.S. 228, 233 (1968), the Court restated the definition of "claim"

for purposes of the civil statute to cover all instances of fraud intended to cause the government to pay out money. There, a grain storage bin vendor supplied false information in support of a loan application to the Commodity Credit Corporation (the "CCC"). Specifically, the company over-stated the purchase price of grain storage bins to induce the CCC to extend larger loans to the company's customers than the CCC's rules otherwise would have allowed. The company argued that it fell outside the *Cohn* definition of "claim" because it had not submitted a claim for payment based on the government's liability to the company. The Court rejected this argument. It revisited the legislative history of the Act and concluded that "the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *Id.* at 232. In accordance with this purpose, the Court ruled that the *Cohn* definition was too restrictive because the False Claims Act reaches "beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *Id.* at 233. As such, the Court ruled that the company was subject to civil False Claims Act liability.

In sum, this Court in *Neifert-White* reconfirmed the *Cohn* definition of a "claim" as meaning a claim that might result in financial loss to the government, but it abandoned the dictum in *Cohn* that a "claim" must be based on the government's liability to the claimant. *Id.* at 231, 233. Accordingly, *Neifert-White* provides no support for the Ninth Circuit's ruling that the False Claims Act extends to all contract violations regardless of their financial effect on the government. Since *Neifert-White*, the Court has again reaffirmed that the plain meaning of claim "connotes a demand for money or for some transfer of public property." *Bornstein*, 423 U.S. at 309 n.4.

The Court's decision in *Rex Trailer Company v. United States*, 350 U.S. 148 (1956), provides no support for the Ninth Circuit's decision. *Rex Trailer* involved fraudulent purchases from the government under the Surplus Property Act, a statute that provided the government with liquidated damages or double damages as alternative remedies for such frauds. The Court upheld the imposition of liquidated damages, stating that it was "obvious that injury to the Government resulted from the . . . fraudulent purchase." *Id.* at 153. The Court unremarkably held that it was not necessary for the government to allege or prove actual damages, which were "difficult or impossible to ascertain," in order to recover liquidated damages. *Id.* at 152-53. The *Rex Trailer* Court regarded injury as a necessary predicate to liability under the Surplus Property Act, just as it has always regarded financial injury as a predicate to liability under the civil False Claims Act.

C. In 1986, Congress Amended the False Claims Act to Define "Claim" as "Any Request or Demand" for "Money or Property."

In 1986, Congress amended the civil False Claims Act to insert a statutory definition of "claim" that comprehends "any request or demand" for the payment of federal "money or property," even if submitted to "a contractor, grantee, or other recipient" of federal funds. 31 U.S.C. § 3729(c).[1] This definition reaffirmed that a false claim under the Act

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[1] The 1986 amendments constituted the first substantive changes to the civil False Claims statute since its inception. In 1982, when Congress enacted Title 31 of the U.S. Code as positive law, including the civil False Claims Act, it substituted "simple language" for "awkward and obsolete terms" and changed language "to attain uniformity," but it made "no substantive change in the law." H.R. Rep. No. 651, 97th Cong., 2d Sess. 1, 2-3 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1896-97.

involves a request or demand for the payment of money. It also broadened the definition of claim to make clear that "frauds perpetrated on Federal grantees, including States and other recipients of Federal funds," were actionable under the False Claims Act, even though the fraudulent claim was not presented directly to the Government. S. Rep. No. 345, 99th Cong., 2d Sess. 21 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5286.

In a second change, Congress further emphasized the focus of the Act on financial injury by inserting a provision to ensure that "reverse false claims," in which the claimant avoids or decreases the amount of money rightfully payable to the government, fall within the scope of the False Claims Act. 31 U.S.C. § 3729(a)(7). Before 1986, courts were divided on whether such claims fell within the ambit of the Act. Congress's action in 1986 recognized that "the effect of fraud on the government is pretty much the same whether too much is extracted from the federal treasury or too little paid in." *United States v. American Heart Research Foundation, Inc.*, 996 F.2d 7, 10 (1st Cir. 1993).

Both of these changes expand the class of "claims" that are subject to the False Claims Act, but they retain the focus of the statute on conduct or omissions that may cost the government money. Congress recognized that reverse false claims and fraud perpetrated on a federal grantee may create a "'financial loss to the Government,'" and accordingly it "strongly endorse[d]" this Court's statements in *Neifert-White*. S. Rep. No. 345 at 19, *reprinted in* 1986 U.S.C.C.A.N. 5284 (quoting *Neifert-White*, 390 U.S. at 232).

D. The History of the Criminal False Claims Act and Criminal False Statements Act Shows That the Civil False Claims Act Reaches Only Financial Frauds.

The New Deal programs of the 1930s presented a new opportunity for fraud against the government: non-financial fraud aimed at manipulating government regulatory programs even if no money or property was sought from the government. *See United States v. Yermian*, 468 U.S. 63, 72 (1984). In particular, the government had been receiving false certifications regarding the amount of oil produced and sold in interstate commerce in violation of a regulatory program designed to stabilize the oil industry. *See United States v. Gilliland*, 312 U.S. 86, 90 (1941). Accordingly, Secretary of Interior Harold L. Ickes advocated a change in the criminal False Claims Act to correct the absence of a "law . . . under which prosecutions may be secured for the presentation of false papers" that interfered with government programs but did not cause financial injury to the government. H.R. Rep. No. 829, 73d Cong., 2d Sess. 2 (1934).

Congress extended the *false statements* provision of the criminal False Claims Act in response to Secretary Ickes' requests. It provided that any falsity, concealment, or cover-up of a material fact in a "false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition" would expose the maker to liability under the *false statements* provision of the criminal False Claims Act. Act of June 18, 1934, ch. 587, § 35, 48 Stat. 996. This language altered the "fundamental character" of that provision in the statute. *Hubbard*, 115 S. Ct. at 1760. Congress deleted the statute's references to financial frauds from the false statements provision and thereby "sever[ed] the historical link with the false claims portion of the statute" that the false statements

provision had previously shared. *Id.* The amendment "broadened the provision so as to leave no adequate basis" for the conclusion that the false statements portion of the statute covered only financial fraud. *Gilliland*, 312 U.S. at 93. Indeed, the Court quickly approved the use of the new false statements provision in the criminal prosecution of non-financial false certifications in connection with the oil regulatory program. *Id.* at 95-96. The amendment reflected "congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from [non-financial] deceptive practices." *Id.* at 93.

This revision supports the conclusion that the provisions of the civil statute extend only to falsehoods that may cause financial injury to the federal treasury. Although Congress expanded the false statements provision of the criminal False Claims statute, it declined to change the civil False Claims statute. If Congress had believed that a civil remedy should exist for non-financial frauds, it would have amended the civil provisions as well as the criminal provisions. But as noted above, the civil provisions remained essentially unchanged from 1909 to 1982, and no amendment subsequent to 1982 indicates any change in this aspect of the civil False Claims statute. In addition, Congress made no change to the provision in the criminal False Claims statute prohibiting false claims (as opposed to false statements). Thus, the False Claims portion of the criminal statute retained the "claim upon or against" language that the Court in *Cohn* held to encompass only financial frauds in which the Government stood to lose money or property. *Cohn*, 270 U.S. at 345-47. The lack of any change in the language of the False Claims provision of the statute indicates a congressional intent to retain the "fundamental" concentration on "financial frauds" embodied by the False Claims

part of the statute. *Hubbard*, 115 S. Ct. at 1760. Indeed, the Court continues to rely on the *Cohn* definition of "claim" in interpreting the criminal provisions of the False Claims Act. *Yermian*, 468 U.S. at 70-71; *Hubbard*, 115 S. Ct. at 1759 n.5.

E. The Alleged Misconduct in This Case Did Not Cause Threatened or Actual Financial Injury to the Government and Cannot Support Civil False Claims Act Liability.

The history of the False Claims Act manifests the relentless pursuit of a single goal: protecting the federal Treasury from those who would defraud the government. Simply put, the Act requires that an actionable false "claim" pose a threat to federal money or property in some manner. The record in this case reveals no such threat. To the contrary, as the Ninth Circuit recognized, the untimely disclosed accounting system "actually saved the government money." Pet. App. 4a. This Court should reverse the erroneous ruling of the Ninth Circuit that a false "claim" can exist even when no federal money or property is at risk.

A run-of-the-mill contract violation that is not associated with any claim for payment, and therefore cannot have any impact on federal funds, cannot form the basis of a False Claims Act lawsuit. There are many regulations and standard Government contract requirements that do not bear on the provision of goods or services under the contract, and therefore are not associated with any claim for payment, such as the Cost Accounting Standards disclosure requirement at issue here. Run-of-the-mill violations of such provisions, for which the Government has a variety of routine remedies, cannot give rise to liability under the False Claims Act.

II. THE PUBLIC DISCLOSURE PROVISION IN THE 1986 AMENDMENTS TO THE FALSE CLAIMS ACT CANNOT BE APPLIED RETROACTIVELY BECAUSE IT ATTACHES NEW LEGAL CONSEQUENCES TO EVENTS COMPLETED BEFORE ITS ENACTMENT.

The event alleged to give rise to liability in this action, Hughes' failure to submit a timely Cost Accounting Standards Disclosure Statement, occurred before enactment of the 1986 amendments to the Act. Under this Court's decisions, the "public disclosure" provision of the 1986 amendments cannot be applied retrospectively to that event.

In *Winfree v. Northern Pacific Railway Company*, 227 U.S. 296, 302 (1913), the Court refused to permit retroactive application of a statute

> permit[ting] recovery, in cases where recovery could not be had before, and [taking] from the defendant defenses which formerly were available, defenses which . . . existed at the time when . . . the accident occurred.

In *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 1505 (1994), the Court reaffirmed that a statute "impair[ing] rights a party possessed when he acted, increas[ing] a party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed" cannot govern preenactment conduct. In other words, "prospectivity remains the appropriate default rule" where, as here, Congress has not addressed the temporal reach of a statute. *Id.* at 1501.

Because the "public disclosure" provision of the amendments changed the rights of both the qui tam relator and defendant, it should not be construed to apply retrospectively to preenactment conduct. Prior to 1986,

courts were required to dismiss suits that were "based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982). In the 1986 amendments, Congress granted qui tam plaintiffs the right to maintain suits even if the government knew of the underlying information:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations . . . unless . . . the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). In 1986, thus, Congress created a new qui tam cause of action that would have been barred under the prior law.

At the same time, Congress stripped defendants in qui tam cases of an absolute defense that "disproved the right of action." *Winfree*, 227 U.S. at 302. The pre-1986 statute permitted government contractors to disclose possible violations to the government so as to preclude qui tam actions. Instead of allowing disclosed information to function as a shield for the contractor, as it would under the law in effect at the time of a pre-1986 disclosure, such information now has become a weapon to be wielded against the contractor.

Notwithstanding the substantive changes wrought by the 1986 amendments on the rights of qui tam relators and defendants, the Ninth Circuit here disregarded *Winfree* and *Landgraf* and erroneously concluded that the public disclosure provision of the 1986 amendments should be applied retrospectively. Indeed, the Ninth Circuit effectively turned *Landgraf* on its head. The court culled a "strong presumption that jurisdictional statutes apply retrospectively" from *Landgraf*, Pet. App. 6a, even though *Landgraf* merely notes in dicta that "a new jurisdictional rule usually

'takes away no substantive right but simply changes the tribunal that is to hear the case'" and thus may be applied retrospectively. 114 S. Ct. at 1502 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). Nothing in *Landgraf* suggests, however, that a statute affecting the parties' substantive rights can be applied retrospectively just because the statute contains the term "jurisdiction." The Ninth Circuit has elevated a meaningless exercise in labeling above a meaningful assessment of the substantive impact of the Act.

The Ninth Circuit eventually asked the proper question to rebut its presumption of retroactivity – whether "the jurisdictional rule curtailed a substantive right" – but it reached the wrong result. Pet App. 7a. Relying on *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1319 (1996), the Ninth Circuit concluded that "the amendment does not infringe on the substantive rights of the defendant." Pet. App. 7a. In *Lindenthal*, the Ninth Circuit simply followed the mechanical approach of looking to the word "jurisdiction" in the statute and concluding that the new public disclosure provision did not alter the substantive rights of the parties because it was jurisdictional. 61 F.3d at 1408. This circular approach overemphasized the importance of the term "jurisdiction" in the public disclosure provision, a term that is "so popular that its chameleon quality sometimes slips from our grasp." *Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n*, 781 F.2d 935, 945 n.4 (D.C. Cir. 1986) (R.B. Ginsburg, J., dissenting) (quoting *United States v. Kember*, 648 F.2d 1354, 1357 (D.C. Cir. 1980).

This fundamental error in its approach to the question of retroactivity led the Ninth Circuit to disparage the substantive effects of the public disclosure provision of the

1986 amendments. But that provision allows a qui tam plaintiff to recover in circumstances where it could not have recovered under prior law and eliminates absolute defenses previously available to a defendant. Whether or not the public disclosure provision is considered "jurisdictional," it cannot be applied retrospectively to alter the substantive rights of the parties.

III. A GOVERNMENT DISCLOSURE OF INFORMATION TO "INNOCENT" COMPANY EMPLOYEES DURING AN AUDIT OR INVESTIGATION CONSTITUTES A "PUBLIC DISCLOSURE" THAT BARS SUBSEQUENT QUI TAM ACTIONS.

Well before this lawsuit was filed, the government conducted an audit of the Hughes accounting practices at issue in the case. In the course of that audit, the government disclosed allegations of accounting impropriety to employees of Hughes and its prime contractor, Northrop, who were not involved in the alleged improprieties. *E.g.*, J.A. 113-15, 157-75. These disclosures constituted a "public disclosure of allegations" in an "administrative . . . audit" within the meaning of the public disclosure provision of the 1986 amendments to the Act, 31 U.S.C. § 3730(e)(4)(A), and this action accordingly should have been dismissed.

The public disclosure provision of the False Claims Act bars qui tam actions that are:

> based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). The statutory text plainly provides that a disclosure of allegations of misconduct to members of the public in one of the ways specified in the statute is a public disclosure. Nothing in the statute suggests that a disclosure must be broadly disseminated to any particular number of individuals, or to any particular categories of individuals, in order to be deemed public. To the contrary, the sorts of public disclosures identified in the statute contemplate disparate degrees of dissemination to different groups of individuals. Broadcasts in the news media may be disseminated widely to the nation at large; Government Accounting Office reports will likely be read by only a few members of the public; disclosures made in the course of civil hearings will likely be disseminated to the litigants and perhaps other interested parties; and disclosures made in administrative audits and investigations will likely be made only to a few specific individuals, typically those subjected to audit or investigation. Under the statute, each of these disclosures ordinarily constitutes a public disclosure and cannot form the basis for a qui tam action, regardless of the number or identity of individuals who receive the information.

Amici do not suggest that all disclosures made in the ways specified in Section 3730(e)(4) will necessarily constitute "public disclosures." The disclosure must be of such a nature that it is "public." Thus, disclosures of allegations to persons who were involved in the alleged wrongdoing would not be "public." Disclosures of allegations made in grand jury proceedings or disclosures made in documents filed under seal in civil proceedings may not be "public." Disclosures of allegations made to government employees may not be "public." But disclosures by the government that reach members of the public who are strangers to the fraud and who are not government employees, or any disclosures in the news media, fall within any

reasonable construction of the term "public disclosure." *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322-23 (2d Cir. 1992).

To escape the conclusion that the disclosures made to Hughes and Northrop employees in the course of an "administrative audit" were "public disclosures," the Ninth Circuit labeled the disclosures a "release of information within a private sphere." Pet. App. 10a. The court asserted that it was "unrealistic" to treat employees of government contractors as "members of the public," since these employees would have a "strong economic incentive" to protect disclosures of wrongdoing from further dissemination. *Id.* at 9a. This assertion is insupportable. Individuals who happen to be employees of defense contractors or subcontractors do not lose their status as members of the public by virtue of their employment.

Nor should the statutory rule be defeated by the unwarranted assumption that such employees will not disseminate the information that is disclosed to them. It is the Ninth Circuit that is "unrealistic" in surmising that employees of government contractors are unlikely to file qui tam suits based upon information relating to fraud. In considering the 1986 amendments Congress heard testimony from employees of defense contractors who had filed qui tam suits against their employers, and it understood that employees were a class of individuals likely to have knowledge of information relating to fraud. *See False Claims Reform Act, 1985: Hearing on S. 1562 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 80-85 (September 17, 1985); S. Rep. No. 345 at 13-14, *reprinted in* 1986 U.S.C.C.A.N. 5278-79; H.R. Rep. No. 660, 99th Cong., 2d Sess. 23 (1986). Indeed, Congress specifically tailored the 1986 amendments to the False Claims Act to encourage employees to file qui tam actions, by enacting

provisions that protect employees from subsequent retaliation. *See* 31 U.S.C. § 3730(h). Furthermore, as the reported qui tam cases attest, the most common qui tam plaintiffs have proven to be current and former employees of corporations, many of which are defense contractors. *See, e.g., United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996); *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995 (2d Cir. 1995); *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407 (9th Cir. 1993); *see generally* John T. Boese, *Civil False Claims and Qui Tam Actions* 4-9 through 4-11 (Supp. 1995).

The Ninth Circuit also looked to the legislative history of the statute for support, stating that a narrow reading of the "public disclosure" bar would further Congress's purpose of encouraging qui tam actions to prod the government into action. Pet. App. 10a-11a. Although this was one of Congress's goals, *see* S. Rep. No. 345 at 24-26, *reprinted in* 1986 U.S.C.C.A.N. 5289-91, H.R. Rep. No. 660 at 22-23, the principal goal of the 1986 amendments was to provide additional incentives for whistleblowers to bring new information to the government concerning fraud, while continuing to ban "parasitic" lawsuits based upon information already in the public domain. *See, e.g., Doe*, 960 F.2d at 321-22; *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991); *see also* S. Rep. No. 345 at 1-2, *reprinted in* 1986 U.S.C.C.A.N. 5266-67; H.R. Rep. No. 660 at 22-23. It would hardly further Congress's purpose if the statute were to allow qui tam actions based on information already disclosed in the course of a government audit or one of the other methods identified in the statute merely because the information had been disclosed only to a few members of the public or to a particular class of individuals.

The Ninth Circuit also objects that if a government disclosure to innocent company employees is interpreted as a public disclosure, then "government possession of information relating to fraud effectively forecloses qui tam suits." Pet. App. 10a. This is untrue. Only qui tam lawsuits that are "based upon" government disclosures in an investigation or audit are barred by the statute. And even if a qui tam lawsuit is based upon information disclosed in a government audit or investigation, qui tam plaintiffs who qualify as "original sources" of the information will remain able to prosecute their actions.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1996

HUGHES AIRCRAFT COMPANY,

PETITIONER,

v.

UNITED STATES *EX REL.* WILLIAM J. SCHUMER,

RESPONDENT.

On Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES, THE AMERICAN HOSPITAL ASSOCIATION, AND THE AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the 1986 amendments to the False Claims Act, which relaxed the restrictions on *qui tam* lawsuits, apply retroactively to actions challenging pre-1986 conduct.
2. Whether the False Claims Act permits employees of government contractors to file "parasitic" *qui tam* actions based on allegations disclosed by the Government in an audit or investigation.
3. Whether the False Claims Act imposes liability for alleged infractions of other statutes or regulations regardless of whether such infractions result in a "false claim" against the public fisc.

For ease of reference, these are the revised questions set forth in Petitioner's main brief. The questions are a clarification of the original questions presented in the petition for *certiorari*.

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INTRODUCTION

This case will resolve two diverse issues under the civil False Claims Act, 31 U.S.C. §§ 3729-3733, of significant interest to *amici*.[1] The first of these issues (revised Question 2) is the proper interpretation of the term "public disclosure" found in 31 U.S.C. § 3730(e)(4)(A), which specifically limits subject matter jurisdiction for actions under the civil False Claims Act brought by private *qui tam* relators. The Court of Appeals for the Ninth Circuit interpreted the term "public disclosure" so narrowly that it permitted an employee of petitioner to proceed with a *qui tam* case even though that employee restated allegations in four Federal audit reports that had been disclosed long before the *qui tam* suit was filed. Both the express language and the purpose of Section 3730(e)(4)(A) demonstrate that, unless brought by an "original source," such a parasitic suit is barred. The second issue to be resolved (revised Question 3) is whether the Court of Appeals properly held that a relator could assert a cause of action under the civil False Claims Act for a regulatory violation even if the alleged violation did not and could not cause a financial loss to the United States. In this case, the alleged "fraud" even resulted in a financial benefit to the government. The Court below improperly ruled that harm to the Federal treasury was not an essential element under the False Claims Act.

Amici urge this Court to reverse on both issues.

INTEREST OF *AMICI CURIAE*

The Association of American Medical Colleges ("AAMC") was founded more than a century ago to improve the process and quality of medical education. Its members include all accredited medical schools in both the United States and Canada; nearly 400 major teaching hospitals; more than 90 academic and professional societies representing

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[1] *Amici* will not address the retroactivity issue addressed in revised Question 1.

some 72,000 members of medical facilities; and students and medical residents at these schools and hospitals.

The American Hospital Association ("AHA") is the primary national membership organization for hospitals in this country, consisting of approximately 5,400 hospitals and other healthcare institutions. The AHA's goal is to promote high-quality healthcare and health services through leadership and assistance to hospitals in meeting the healthcare needs of their communities. Many of the AHA's members are teaching hospitals.

The American Medical Association ("AMA"), founded nearly 150 years ago, is a private, non-profit organization of physicians. With 290,000 members who practice in all 50 states and in all fields of medicine, the AMA is the primary national organization of physicians in America. The AMA is dedicated to promoting the art and science of medicine and the betterment of public health, and serves physicians and patients by, among other things, establishing and promoting ethical, educational, and clinical standards for the medical profession.

These three associations (collectively the "Healthcare Associations") have a compelling interest in the proper resolution of the questions at issue in this case. The members of the Healthcare Associations, either individually as physicians or institutionally as hospitals, deliver health services to an overwhelming majority of citizens in this country. A significant part of those health services are fully or partially funded by the Federal government through a variety of programs, including Medicare[2] (healthcare for the aged), Medicaid[3] (healthcare for the poor and disabled), CHAMPUS[4]

[2] Codified in various sections of Title 42 of the United States Code, primarily at 42 U.S.C. § 1395, *et seq.*

[3] Codified in various sections of Title 42 of the United States Code, primarily at 42 U.S.C. § 1396, *et seq.*

[4] 10 U.S.C. ch. 55; *see* 32 C.F.R. § 199.

(healthcare for civilian dependents of military personnel), the Railroad Retirement Act[5] (benefits including Medicare-like coverage for retired or disabled railroad workers), and other Federal healthcare programs. Like contractors in the defense industry, providers of health services under these programs are highly regulated by various Federal agencies. These Federal agencies, along with Federal claims processing contractors and related state agencies, conduct both routine and special investigations, audits and reviews of program and financial operations of members of the Healthcare Associations. These audits, reports and reviews are regularly circulated to various employees and agents outside of the government.

The Healthcare Associations, and their members, are committed to providing high-quality medical services to the American people in full compliance with all rules and regulations adopted for such programs. Nonetheless, the complexity of the rules and regulations under which these programs operate often makes such compliance difficult, resulting in numerous disputes over regulatory interpretation and compliance. As a result, in the past ten years, various members of the Healthcare Associations have found themselves defending lawsuits by individuals -- called *qui tam* relators -- alleging that these regulatory disputes amount to "false and fraudulent" claims in violation of the False Claims Act, and that the Act's full remedies of treble damages plus penalties of $5,000 to $10,000 per false claim are applicable to these regulatory disputes. As Congress and the Federal enforcement agencies focus more on allegations of healthcare fraud, these *qui tam* cases are increasing rapidly.[6]

[5] 45 U.S.C. § 231, *et seq.*

[6] Indeed, the last three years have seen a dramatic shift in the attention of *qui tam* relators towards the healthcare industry. Whereas *qui tam* recoveries related to alleged healthcare fraud represented approximately 1 to 8 percent of the total *qui tam* recoveries in the years 1988 to 1992,

In many instances, these relators are not original sources of the allegations. Instead, they learn of these violations from auditors or investigators of the Federal government or its agents, the contractors who process and pay the claims on behalf of the government, or from the healthcare institutions themselves, who are conducting internal audits at the request, and often at the insistence, of the Federal government. The Healthcare Associations believe that such parasitic *qui tam* suits are barred by the subject matter jurisdictional provision of the False Claims Act, 31 U.S.C. § 3730(e)(4). Accordingly, they seek reversal of the decision below because the interpretation of the term "public disclosure" by the Court of Appeals was unreasonably narrow and would subject the members of the Healthcare Associations to numerous unwarranted parasitic *qui tam* suits.

Indeed, absent some clarification by this Court, the future is likely to hold even more opportunities for parasitic suits by opportunistic *qui tam* relators seeking to extract settlements. For instance, in June 1996 the Department of Health and Human Services Office of the Inspector General ("OIG") commenced the Physicians At Teaching Hospitals ("PATH") initiative, a series of nationwide compliance audits focusing primarily upon the Medicare rules governing the billing of physician services provided by residents and their teaching physicians. (*See Amici* App. at 4a through 6a). As part of the PATH initiative, OIG "encourages" internal audits within the teaching hospitals by offering potential liability reductions if such internal investigations are implemented in compliance with an OIG protocol. This protocol limits whom the party may select as the investigator; requires the waiver of all privileges, including attorney-client privilege, and rights to withhold documents; and permits the government to receive all draft audit reports and to be present for any relevant dis-

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healthcare-related *qui tam* recoveries accounted for 36 to 46 percent of total *qui tam* recoveries in 1993, 1994, and 1995. (*See Amici* App. at 3a).

cussions with the independent reviewer. At every stage of this process, the institution must fear that an opportunistic individual, who learns of the regulatory noncompliance only through the PATH audit, could seek to file a *qui tam* case and argue that no "public disclosure" has occurred.

The PATH initiative is just one example of future audits and reviews of program compliance likely to be conducted by the members themselves at government direction.[7] The enormous complexity of the Federal healthcare regulatory system, and the desire of members of the Healthcare Associations to discover and resolve any regulatory disputes with the government, will result in increasing reliance, both by the government and the members, on initiatives like PATH. Absent this Court's clarification of the jurisdictional bar, initiatives in which both the government and the industry are auditing compliance with a complex regulatory scheme will likely be fertile grounds for opportunistic *qui tam* relators who will simply lie in wait until these audits provide the necessary informational framework for a *qui tam* action.

In addition, members of the Healthcare Associations have been threatened, both by *qui tam* relators and by government attorneys, with False Claims Act ("FCA") suits seeking penalties in the millions of dollars even though the government suffered no financial loss. In most cases, these situations arise because the government (or commonly the relator alone) believes that a healthcare provider is violating a statute or regulation whose violation has no impact on the

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[7] The Secretary of Health and Human Services announced in June 1995 a pilot voluntary disclosure program for the healthcare industry modeled on the voluntary disclosure program that has been in operation for many years at the Department of Defense. Although initially limited to key states and specific types of healthcare service providers, the Secretary stated her intent that this program will be a nationwide program. Like PATH, a healthcare institution which is accepted into the HHS voluntary disclosure program is "strongly encouraged" to conduct a full financial audit and review and report to HHS about the results of that internal audit.

Federal treasury and would generate no "damages." Despite this lack of financial harm, these plaintiffs seek to extract large settlements by arguing that the FCA nevertheless allows imposition of the civil penalties found in 31 U.S.C. § 3729(a) of between $5,000 to $10,000 for each alleged false claim.

The Healthcare Associations believe that use of the False Claims Act in such situations is abusive and beyond the scope of the Act. Indeed, the assertion by the *qui tam* relator in this case that a violation of the False Claims Act can exist without financial loss to the Federal treasury exemplifies the manner in which the Act is abused by private *qui tam* relators and the government in an attempt not to remedy losses, but to bully members of *amici* into inflated settlements. The relator's argument has no basis in the language or purpose of the Act, and *amici* urge this Court to reject the holding of the Court of Appeals.

In recognition of the AAMC's, the AHA's and the AMA's interest in this case, the parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

I. The limitation on subject matter jurisdiction found in 31 U.S.C. § 3730(e)(4) balances two competing interests: to bar "parasitic" *qui tam* suits based on allegations already disclosed either through the public media or through existing government audits and investigations and, at the same time, to encourage true "whistleblowers" to come forward with evidence of fraud. By passing Section 3730(e)(4) in 1986, Congress intended to overrule the result in cases such as *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), in which, under the pre-1986 jurisdictional bar, true whistleblowers who had brought evidence of fraud to the attention of Federal auditors and investigators were barred from bringing a *qui tam* suit.

Congress fashioned a two-step remedy in 1986 that barred *qui tam* cases which reassert "publicly disclosed" allegations or transactions, unless the relator who brings the case is an "original source." Under this jurisdictional regime, once the allegations of fraud are "publicly disclosed," an FCA suit may be brought only by the government itself (which is not affected by this jurisdictional bar) or by a true whistleblower -- an "original source" -- who knew of the fraud and voluntarily disclosed the allegations to the government in the first instance, precisely the situation of the State of Wisconsin in the *Dean* case cited above.

The initial question in the application of this jurisdictional bar is whether the allegation or transaction has been "publicly disclosed" in one of many ways: in the course of a civil or criminal hearing or trial; in a government report, hearing, audit or investigation; or in the news media. This requirement for "public disclosure" was designed by Congress as a threshold test, a "quick trigger," to determine which cases warrant the more exacting determination of whether the relator is an "original source" that Congress intended to encourage and reward.

The restrictive interpretation of the term "public disclosure" in the Court of Appeals decision below is contrary to both the language and the purpose of the jurisdictional bar. The language in Section 3730(e)(4)(A) does not limit the nature, form or extent of the disclosure necessary for that disclosure to be "public." The disclosure could be written (*e.g.*, "report") or oral (*e.g.*, "hearing"). The disclosure can be to large numbers (*e.g.*, in the "news media") or small numbers (*e.g.*, in an "audit or investigation"). Congress intended only that the allegations or transactions be disclosed outside the government, where an opportunistic relator might file a parasitic *qui tam* suit. This "quick trigger" guarantees that whenever a parasitic suit is possible -- that is, whenever there has been any form of public disclosure -- only the true whistleblower, the "original source," may file the *qui tam* case.

II. Since its passage in 1863, the civil False Claims Act has always been intended and applied as a remedial statute to

reimburse the Federal treasury for financial loss resulting from fraud. The FCA is not, and has never been, an all-purpose remedy for any type of regulatory violation. The conclusory holding of the Court of Appeals below that "the lack of . . . actual harm from the [regulatory] violation does not preclude a claim under the FCA" not only misreads the Supreme Court case cited, but also disregards over 70 years of law on this subject.

In that time frame, this Court has found civil False Claims Act liability only in those cases in which there has been financial loss to the Federal treasury. Other cases, despite finding regulatory or statutory violations, have found no False Claims Act liability where the government can show no financial loss. The per-claim "penalties" in the civil False Claims Act, now $5,000 to $10,000 per false claim, were designed not to penalize regulatory violations but as a form of "rough justice" to remedy those situations where the financial loss is certain but difficult to calculate. Both the damages and the penalties imposed under the FCA are intended to remedy financial harm caused by fraud; they are not intended to punish false statements or regulatory violations resulting in no financial loss in order to fund the payroll for government auditors and investigators.

ARGUMENT

I. GIVEN CONGRESS' CLEAR INTENT TO BAR PARASITIC SUITS, DISCLOSURE OF ALLEGATIONS TO ANY SEGMENT OF THE PUBLIC IN THE COURSE OF A GOVERNMENT OR GOVERNMENT-MANDATED AUDIT OR INVESTIGATION IS "PUBLIC DISCLOSURE" UNDER 31 U.S.C. § 3730(e)(4)(A)

The 1986 amendments to the False Claims Act, while clearly intended to expand the role of *qui tam* relators in False Claims Act litigation, were just as clearly intended to bar "parasitic" suits in which a *qui tam* relator simply reasserts

allegations that the government is already investigating or that others have already disclosed. In furtherance of these goals, Congress enacted the jurisdictional bar in 31 U.S.C. § 3730(e)(4), which provides a two-part test for subject matter jurisdiction. Specifically, the False Claims Act bars *qui tam* actions

> based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). In short, if the allegations have been "publicly disclosed," then the *qui tam* relator must be an "original source," as that term is defined in 31 U.S.C. § 3730(e)(4)(B).[8]

The jurisdictional bar, of course, does not prevent the government itself from remedying false claims, since it explicitly does not apply to the Attorney General. 31 U.S.C. § 3730(e)(4)(A). Instead, the jurisdictional bar applies *only* in those *qui tam* cases which the Attorney General has fully investigated and determined are not of sufficient merit to warrant intervention and prosecution by the Department of Justice. If the Department of Justice does intervene, then subject matter jurisdiction is established and questions regarding the "public disclosure" of allegations or the "original source" status of the *qui tam* relator are largely irrelevant. 31 U.S.C. § 3730(b). Moreover, the jurisdictional bar applies only where there has been disclosure (1) in a government

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[8] Because the District Court and the Court of Appeals both held that the government had not made a public disclosure, if this Court reverses the Court of Appeals on the "public disclosure" issue, the lower courts would need to resolve the original source question.

hearing, audit, investigation or report -- in which case the government has already focused upon the plaintiff's allegations or transactions -- or (2) in a civil, criminal or administrative hearing or some form of news media coverage -- in which case the government is likely to learn of such allegations or transactions regardless of whether a *qui tam* action is filed. 31 U.S.C. § 3730(e)(4)(A). Thus, the government's ability to remedy false claims is not affected significantly by the issue at bar.[9]

Since Congress intended to bar parasitic actions based on allegations arising out of government inquiries disclosed to the public, the term "public disclosure" -- at least in the context of a disclosure of a government audit, report or investigation -- must encompass any disclosure to a non-government person or entity. The jurisdictional bar of the *qui tam* provisions of the FCA harmonizes the need to offer an incentive for informants to reveal frauds hidden from the government and the desire to prevent parasitic claims that offer no benefit to the government. To achieve this harmony, Congress excluded *qui tam* actions based upon allegations disclosed in the course of government hearings, audits, reports and investigations because such actions do not assist in exposing fraud but instead unfairly reward opportunistic plaintiffs who contribute nothing to the discovery

[9] Indeed, *qui tam* cases pursued by relators after the government declines to intervene have made a minuscule contribution to government fraud recoveries in the nearly ten years of liberalized *qui tam* enforcement following the 1986 Amendments. As of October 1995 (the date of the most recent official DOJ press release on this subject), relators have recovered only $15 million in *qui tam* cases in which the government, after investigation, declines to intervene and allows the relator to proceed alone. That sum is trifling compared to the $1.13 billion in recoveries in *qui tam* cases in which the government intervenes and prosecutes the civil claims. *See* U.S. Department of Justice Press Release, *Justice Department Recovers Over $1 Billion in Qui Tam Awards and Settlements*, October 18, 1995. (*Amici* App. at 1a-3a). In other words, *qui tam* cases pursued by the Department of Justice account for nearly 99 percent of the total false claims recoveries to the government in cases originally filed by *qui tam* relators.

of fraud. This common sense interpretation of "public disclosure" would not preclude *qui tam* actions by true whistleblowers, of course, because a *qui tam* action based on publicly disclosed information may still be brought by an "original source," as defined in 31 U.S.C. § 3730(e)(4)(B).

In this context, it makes little difference how widely the government's disclosure of the relevant allegations of false claims was disseminated. The fact that such allegations are "public" -- that is, are disclosed outside of the government and are no longer private -- creates, virtually by definition, the risk of a parasitic claim. Moreover, barring such claims, even where the public disclosure was not widely disseminated, does not undermine the purposes of the FCA. *Qui tam* plaintiffs who merely repeat allegations upon which the government has already focused its inquiries, and who are not "original sources," contribute nothing to the government's efforts at ferreting out false claims. Accordingly, whether or not the government's public disclosure is widespread or limited, this type of *qui tam* action does not in any meaningful way contribute to the government's efforts to uncover and remedy fraud.

Here, Schumer's *qui tam* complaint is based upon allegations contained in several government audit reports going back over three years that were disclosed to various innocent individuals at Hughes and at Northrop, the prime contractor, which was unquestionably innocent of any allegation of wrongdoing. His complaint added nothing to the government's efforts at uncovering fraud. Thus, the claim falls squarely in the category of parasitic claims excluded by the jurisdictional bar of the *qui tam* provisions unless brought by an original source.

A. The Historical Development Of The Jurisdictional Bar To "Parasitic" *Qui Tam* Suits

The meaning of the term "public disclosure," and the applicability of the jurisdictional bar to Schumer's claims, becomes apparent through an analysis of Congress' intent in

crafting the jurisdictional bar in 1986. The history of the jurisdictional bar reveals Congress' intent to exclude "parasitic" *qui tam* suits and reward true whistleblowers.

Congress enacted the False Claims Act, including the *qui tam* enforcement procedures, in 1863 to address allegations of rampant fraud by Union contractors during the Civil War. S. Rep. No. 99-345, at 8-10 (1986), *reprinted in* 1986 U.S.C.C.A.N. (100 Stat.) 5266, 5273-75. The *qui tam* provisions of the FCA were included in order to meet Congress' goal of "setting a rogue to catch a rogue" by inducing informers "to betray [their] coconspirators." Cong. Globe, 37th Cong., 3d Sess. 955-96 (Feb. 14, 1863). Congress accomplished this purpose by permitting anyone at all to bring such *qui tam* actions. This original statute contained no jurisdictional bar.

Congress first enacted a jurisdictional bar in 1943 upon recognizing that the original statute permitted such free use of the *qui tam* provisions that opportunistic relators could file parasitic claims that contributed little or nothing to the government's efforts at unearthing fraud but nevertheless resulted in windfall recoveries to the relators. Congress' recognition of this problem was triggered primarily by the case of *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), in which a plaintiff who had no personal knowledge of a false claim simply copied the indictment as his *qui tam* complaint. The Court found a lack of statutory language barring such cases and, stating that the recovery of money to the government was itself a contribution that satisfied the intent of the FCA, permitted the *qui tam* action to stand. *Id.* at 545.

Congress quickly rejected the Court's reasoning that the mere recovery of money by the federal treasury justified such *qui tam* actions and reversed the Court's allowance of such parasitic cases in which the relator offers the government no assistance in uncovering fraud. Within the year, Congress amended the FCA by inserting a jurisdictional bar to prevent such parasitic actions. Act of December 23, 1943, 57 Stat.

608, *recodified in* 31 U.S.C. § 3730(b)(4) (1982) (superseded); S. Rep. No. 78-291 (June 8, 1943); S. Rep. No. 77-1708 (Nov. 25, 1942).

Congress, however, overcompensated for the problem of parasitic suits in two ways. First, the 1943 jurisdictional bar excluded any action based upon information in the possession of the government, whether or not it was part of a government audit, investigation, report or other proceeding. Second, and most importantly, the 1943 amendment contained no exception for true whistleblowers, *viz.*, the informants who were the original source of the government's knowledge. Act of December 23, 1943, 57 Stat. 608, *recodified in* 31 U.S.C. § 3730(b)(4) (1982) (superseded). Accordingly, even plaintiffs who first made the government aware of a fraud were barred from filing *qui tam* actions. The best example of this overcompensation, according to a later Congress, is the case of *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984). S. Rep. No. 99-345, at 12-13. In that case, a *qui tam* action by the State of Wisconsin was dismissed on the basis of the pre-1986 jurisdictional bar of "government knowledge" even though the Federal government only learned of the fraud because of Wisconsin's extensive investigation.

The present jurisdictional bar is the result of Congress' correcting this overcompensation and seeking simply to implement "what it apparently thought it had in 1943: a law requiring that the relator be the original source of the government's information." *Wang v. FMC Corp.*, 975 F.2d 1412, 1410 (9th Cir. 1992) (*citing* S. Rep. No. 99-345, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269).[10] Thus,

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[10] The full quote by the Court in *Wang* is instructive:

"This restrictive interpretation [in the *Dean* case] was too much for Congress. In part, the 1986 amendments to the Act were 'aimed at correcting restrictive [court] interpretations of the act's . . . *qui tam* jurisdiction' provisions. *Senate Report*, at 4, 1986 U.S.C.C.A.N. 5269. The 1986 amendments to *qui*

Congress intended to refine the line between encouraging private citizens to expose fraud to the government and avoiding parasitic suits by opportunistic plaintiffs who do not meaningfully contribute to that goal. *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991); *Wang v. FMC Corp.*, 975 F.2d at 1419; *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1519-20 (10th Cir. 1996); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). Congress' action resulted in the two-part test now found in 31 U.S.C. § 3730(e)(4). The "public disclosure" element of that test must be broadly construed to fulfill this dual purpose.

B. The Court of Appeals' Restrictive Interpretation Of "Public Disclosure" Is Inconsistent With The Language And Intent Of Section 3730(e)(4)

Congress' intent to exclude parasitic claims clearly requires that the term "public disclosure" be broadly applied to encompass any disclosure to a person or entity outside of the government, *i.e.*, any member of the general public. *United States ex rel. Doe v. John Doe*, *supra*, 960 F.2d at 323; *United States ex rel. Fine v. Advanced Sciences, Inc.*, ___ F.3d ___, No. 95-2014, 1996 WL 638448 (10th Cir. Nov. 6, 1996).[11]

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tam jurisdiction were remedial, not innovative. Congress wanted in 1986 what it apparently thought it had in 1943: a law requiring that the relator be the original source of the *government's* information. Seeking only to 'correct' opinions like *Dean*, Congress permitted one who publicly disclosed the information to bring a *qui tam* suit. There is nothing to suggest that Congress meant to do any more than that, and some evidence that it meant to do less. *See* § 3730(e)(2)(A) (*qui tam* suits against political officials still barred if involving information already possessed by the government)." *Wang*, 975 F.2d at 1419 (emphasis in original).

[11] The Court of Appeals for the Tenth Circuit has also discussed this issue in two other cases. In *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548, 553 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993), the Court held that the determination of "public" is not based on how many people were informed of the alleged fraud. The only issue is whether the disclosure is made to any member of the public not previously informed. *See also United States ex rel. Fine v. MK-Ferguson Co.*, ___ F.3d ___, No. 95-2011, 95-2021, 1996 WL 638479 (10th Cir. Nov. 6, 1996).

Congress intended, as detailed above, that the jurisdictional bar prevent parasitic claims by any individual whose claims or allegations have already been addressed and disclosed to any segment of the public by, among other methods, a government hearing, audit, investigation or report. This jurisdictional bar certainly cannot depend upon how widely the government disseminated such information. If allegations in a government report or audit were disclosed to a member of the general public, there is an immediate threat of a *qui tam* action by a relator who did not contribute to the disclosure of the fraud. Such an action is parasitic. It does not further the goals of uncovering fraud, and it simply rewards individuals who have contributed nothing to combatting fraud. It matters little whether the government disclosed such allegations to five, five hundred, or five million individuals. Any disclosure outside of the government raises the threat of a parasitic claim.

Congress' intent to adopt a broad definition of "public disclosure" is evident in the statutory language. Section 3730(e)(4)(A) encompasses a number of different types of disclosure. "Public disclosure" includes written disclosures (in "reports") as well as oral disclosures (in criminal or civil "hearings"). "Public disclosure" includes both wide public release in the "news media," as well as much more limited disclosure in an administrative "audit or investigation." This language is intended to cover a broad spectrum.

The requirement of public disclosure simply identifies a broad category of potentially parasitic cases to be subjected to

the more exacting and more precise "original source" analysis. *Cf., Precision Co.*, 971 F.2d at 552-53. As the Court of Appeals for the Tenth Circuit recognized, the dual goals of Section 3730 -- to encourage the exposure of fraud by informers and to avoid parasitic claims by opportunists who do not contribute to unearthing the fraud -- are carried out primarily through the original source exception, *id.*, which is the heart and soul of the FCA's jurisdictional bar. *Wang*, 975 F.2d at 1410. Interpreting "public disclosure" broadly to include disclosure outside of the government fulfills these dual purposes of the *qui tam* provisions of the FCA, permitting full application of the "original source" test.[12]

Nor is a broad interpretation of "public disclosure" inconsistent with the FCA's goal of encouraging informers to come forward. Once the government has initiated or conducted an inquiry into a fraud, there is simply no need to provide such an incentive unless, as is the case with those relators who are original sources, they have already contributed to the disclosure. In addition, a restrictive interpretation of "public disclosure" would be inconsistent with the Congressional purpose to encourage and reward true whistleblowers. If "public disclosure" is interpreted narrowly, as in the decision below, the logical result is a race to the courthouse by which an opportunistic relator who adds nothing to the government's investigation of fraud may be the first to file a *qui tam* case and may thus exclude the true whistleblower, the "original source," from filing a *qui tam* case.[13]

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[12] A broad interpretation of "public disclosure," tending to restrict jurisdiction, is also more consistent with the Court's long-held understanding that statutory grants of jurisdiction to federal courts should be strictly construed; federal courts should "scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971); *Healy v. Ratta*, 292 U.S. 263, 270 (1934).

[13] Under 31 U.S.C. § 3730(b)(5), once a *qui tam* case is brought, no other person other than the government may intervene or bring another *qui tam* case based on those same facts. A broad interpretation of "public disclosure" thus reserves the right to file a *qui tam* case for the "original source."

Moreover, a broad interpretation of "public disclosure" is also consistent with general principles of judicial economy. A restrictive interpretation of "public disclosure" would require a pre-trial jurisdictional inquiry into the extent to which the government had publicly disclosed the relevant allegations or transactions and the sufficiency of such disclosures for the purposes of the jurisdictional bar. Such a pre-trial jurisdictional inquiry would be "onerous, impractical, and ultimately would serve neither the interests of the parties nor the court." *Precision Co., supra*, 971 F.2d at 553. In many cases, ascertaining the scope of such public disclosure would be nearly impossible. The parties, and the court, would be forced to make inquiries regarding every federal employee who could have made such a disclosure, every member of the general public who spoke to a federal employee regarding topics related to the relevant allegations or transactions, every person who received communications from those individuals on such topics, *ad infinitum* -- all in the context of a pre-trial jurisdictional determination. Unlike the discrete, focused inquiry that can be made in the context of determining whether the *qui tam* relator is an "original source," the inquiry required to determine the scope of public dissemination would be endless. Conducting such an inquiry in the course of a full trial is difficult; expecting it in a pre-trial jurisdictional inquiry seems more than a little absurd. *Id.*

Similarly, to the extent the Ninth Circuit may be concerned about a return to the pre-1986 government knowledge standard, *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519 (9th Cir. 1995), Pet. App. at 10a, such concern is misguided. Not only does the jurisdictional bar now contain an exception to allow a *qui tam* case to be filed by an "original source" -- a significant exception which did not exist before 1986 -- but Congress also has limited the ju-

risdictional bar to public disclosures "in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." 31 U.S.C. § 3730(e)(4)(A). This category is somewhat more narrow than the pre-1986 standard of mere "government knowledge" by some employee in some agency. Moreover, the creation of the jurisdictional bar was premised upon the determination that a *qui tam* suit restating allegations already unearthed through government inquiries, and which contributes nothing to the uncovering of fraud, was parasitic and undesirable. In any event, under the present jurisdictional bar, the mere existence of a government investigation is not enough to bar a *qui tam* action. Instead, there must be a disclosure (1) in the course of that investigation (2) to a member of the general public (3) of the relevant allegations and/or transactions relating to a false claim; and, most importantly, (4) the plaintiff must not be an original source. 31 U.S.C. § 3730(e)(4)(A).

Here, Schumer's *qui tam* suit contributed nothing to the uncovering of a fraud. Acting upon information given to the government by Northrop, the government conducted audits of possible fraudulent conduct. Once the inquiry was completed, the government then distributed the findings in the audit reports, which alleged improper allocation of costs resulting in possible unauthorized charges to the government, to innocent employees of Hughes and Northrop. The government initially withheld $15.4 million, and ultimately paid the amount after it determined that the alleged misallocation in fact was favorable to the government. Only after the government had fully addressed the allegations did Schumer file this action alleging, in substance, what was contained in the government's audit reports -- exactly the type of parasitic claim Congress never intended unless brought by an original source. This narrow interpretation by the Court of Appeals must be reversed.

C. "Public Disclosure" Also Includes Disclosure Through Internal Audits By Healthcare Institutions

Amici submit that the phrase "administrative audits, reports and investigations" is not limited solely to such inquiries by the government alone. For example, as discussed above, the Inspector General of the United States Department of Health and Human Services is demanding that many healthcare providers conduct audits of alleged regulatory noncompliance and report those findings directly to the Secretary. These investigations and audits, while nominally conducted by the institutions, are in fact administrative reviews conducted at the express request of, and under rules set by, the government. As such, disclosure of allegations from such audits and investigations should also be considered "public" disclosure through an administrative audit or investigation under 31 U.S.C. § 3730(e)(4)(A).

Information uncovered during audits such as those performed pursuant to the Inspector General's PATH initiative is certain to be brought to the attention of the government, making whistleblowers unnecessary. However, during both the investigative stage, when facts are developing, and at the reporting stage, when the audit results are reported both to the government and to other non-government entities, the allegations are certain to be more widespread. As a result, such "internal" audits are fertile ground for opportunistic *qui tam* relators.

As detailed above in the statement of interest of the *amici curiae*, the PATH audits demanded by the government are investigations which will inform the government of any regulatory noncompliance as effectively as if the audits were performed by the government itself. Hospitals performing audits pursuant to the PATH initiative must waive all privileges and must submit to the presence of government investigators during any relevant discussions with the auditors. Moreover, the audits must be performed by government-

approved independent investigators, who must follow government-dictated procedures during the course of their investigations. Such investigations are thus designed to *function as government audits* -- that is, the PATH audits are designed not as private self-investigations initiated for purposes of ensuring compliance, but as a means of providing detailed information to the government regarding the extent of compliance. The PATH initiative is but one example of numerous government initiatives which prompt audits that are the functional equivalent of government-conducted audits and investigations. Under such circumstances, *qui tam* relators who have nothing new to contribute to the investigations are just as parasitic -- and the government needs their aid just as little -- as they are in cases based on investigations performed by government-employed auditors, rather than by private auditors acting at the government's behest.

II. HARM TO THE PUBLIC FISC IS AN ESSENTIAL ELEMENT FOR A CAUSE OF ACTION UNDER THE FALSE CLAIMS ACT

The Ninth Circuit's decision stands for the rather remarkable position that the mere violation of a regulation by petitioner in the course of its performance of its contracts violates the civil False Claims Act even though the petitioner's action did not result in financial loss to the government. Indeed, the DCAA itself found that Hughes' conduct actually resulted in a positive *gain* for the government. The facts presented by this *qui tam* case demonstrate quite clearly why financial loss is an essential element of a False Claims Act violation.

There is no single act or type of act that generates liability under the False Claims Act; instead, those acts vary widely. *See* 31 U.S.C. § 3729 (a)(1)-(7). They include submission of a "false or fraudulent claim for payment" (subsection (a)(1)); entry into a "conspiracy to defraud" the government (subsection (a)(3)); deliberate concealment of government

property (subsection (a)(4)); or use of a false record to decrease an obligation to the government (subsection (a)(7)). What is common in all of these acts, however, is the existence of a financial or monetary loss to the Federal treasury.

The civil FCA was not intended to punish a claim, statement, conspiracy or other conduct which, while in violation of other Federal laws and regulations, does not result in a loss to the Federal treasury. It is not "designed to reach every kind of fraud practiced on the government." *United States v. McNinch*, 356 U.S. 595, 599 (1958). Rather, the FCA is a *remedial* statute designed to remedy the government's *pecuniary and proprietary losses* by compensating the Treasury for damages it suffered as a result of successful execution of fraud. *United States v. Halper*, 490 U.S. 435 (1989); *see also United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551 (1943) (the "chief purpose of the [civil FCA] was to provide for *restitution to the government of money* taken from it by fraud . . .") (emphasis added). The summary conclusion of the Court of Appeals decision below, that "the lack of determination of actual harm from the [regulatory] violation does not preclude a claim under the FCA," simply misconstrues the clear purpose of the False Claims Act.

A. This Court Has Consistently Interpreted The False Claims Act As A Statute Designed To Recoup Losses To The Treasury

As explained above, the FCA was enacted during the Civil War, at the request of the War Department and the Treasury Department, as a response to rampant fraud committed by suppliers to the Union Army. Cong. Globe, 37th Cong., 3d Sess. 952 (1863). FCA liability was designed to reach overbilling and billing for substandard or nonexistent goods and services. The FCA's sponsoring senator noted, for example, that military contractors were billing the Army for artillery shells filled with sawdust rather than explosives. *Id.* at 955. The civil provisions of the FCA provide the government with "the privilege of coming upon [a fraudulent con-

tractor] or his estate and his heirs and recovering the money of which it is defrauded." *Id.* at 958. Congress' concern at the time was that "our Treasury is plundered day to day by bands of conspirators," *id.* at 955, with "diabolical schemes for the purpose of procuring money from a distracted, and what will in a short time be an impoverished country." *Id.* at 954. The FCA was plainly enacted to protect the public fisc, and its civil provisions were meant to recoup Treasury losses, not to penalize general dishonesty.

It strains credulity to argue that the FCA provides a *qui tam* relator or the government with a cause of action to penalize a technical regulatory violation which cost the Treasury *nothing* -- indeed, which in this case *saved* the government money. This Court has recognized repeatedly the distinction between false or fraudulent claims or other acts that "plunder the Treasury," and other false, fraudulent or illegal conduct which does not affect the public fisc, and thus do not fall within the scope of the FCA.

Seventy years ago, in *United States v. Cohn*, this Court emphasized that under the False Claims Act, actionable false claims are only those which fraudulently cause the government "pecuniary or property loss." 270 U.S. 339, 347 (1926).[14]

[14] The *Cohn* case, as well as the *Gilliland* and *Bridges* cases discussed *infra*, though criminal cases, are instructive as to the scope of the civil False Claims Act because of the historical development of the civil False Claims Act language. The original FCA passed in 1863 provided for both civil and criminal liability for the same proscribed acts. The FCA was later codified in the Revised Statutes of 1878. The criminal provisions were codified at Section 5438; the civil provisions, Section 3490, simply triggered civil liability on those acts identified in Section 5438. The criminal False Claims Act was slightly modified in 1909 and 1918, and was amended significantly in 1934 (*see Gilliland, infra*), but Section 5438 of the 1878 Revised Statutes, while no longer an operative criminal statute, continued to specify the acts giving rise to civil liability until the civil FCA was codified at 31 U.S.C. § 3729, *et seq.* by the 1986 FCA amendments. *See Rainwater v. United States*, 356 U.S. 590, 592 n.8 (1958); *United States v. Bornstein*, 423 U.S. 303, 305 n.1 (1976).

Cohn was indicted under the criminal False Claims Act, which at that time punished basically the same "acts" that resulted in a civil action under the civil portions of the Act. The indictment alleged that Mr. Cohn had fraudulently claimed a shipment of imported cigars from United States customs officials which the government possessed as bailee. This Court held that, because the government was a mere bailee with only temporary possession of the cigars, Cohn did not "defraud" the government within the meaning of the False Claims Act. He did not deprive the government of its money or property -- rather, he cheated the rightful owner of the cigars. *See id.* at 346-47. This Court squarely rejected the government's argument that the False Claims Act addresses such intangibles as "interference with lawful government functions," and held that the Act addresses fraud in "its usual and primary sense." *Id.* at 346.[15] Because Cohn did not "wrongfully obtain[] money [or] other property of the Government," *id.* at 347, his false claim to the goods did not violate the FCA. This Court has repeatedly cited *Cohn* with approval. *See, e.g., United States ex rel. Marcus v. Hess*, 317 U.S. at 545; *United States v. McNinch*, 356 U.S. 595, 600 n.10 (1958) (citing *Cohn* and holding that a "claim" under FCA applies only to claims for the government's money or property).

The Court again recognized the distinction between false statements made in furtherance of a fraudulent claim, and false statements which do not affect the public fisc, in *United States v. Gilliland*, 312 U.S. 86, 92-93 (1941). The Court in *Gilliland* distinguished the provisions addressed in *Cohn* from provisions which are "made to embrace false and fraudulent statements or representations where these were knowingly and

[15] The "usual and primary sense" of fraud is based on the common law principle that financial loss is an essential element of any claim for fraud. This is an age-old doctrine (*see, e.g.*, 26 C.J. 1169; *Ming v. Woolfolk*, 116 U.S. 599 (1886)) that still survives today. *See, e.g., Bastian v. Petren Resources Corp.*, 892 F.2d 680, 685 (7th Cir.), *cert. denied*, 496 U.S. 906 (1990).

willfully used in documents or affidavits 'in any matter within the jurisdiction of any department or agency of the United States.' " *Id.* at 93. This Court held that, unlike provisions addressing false *claims*, the false *statements* provision at issue -- which was later severed from the False Claims Act and became the False Statements Act -- in *Gilliland* was not restricted to "cases involving pecuniary or proprietary loss to the government." *Id.* Thus, the civil and the criminal False Claims Act apply *only* to false statements made in attempt to plunder the Treasury -- that is, unlike the False Statements Act, they are restricted to cases involving *pecuniary or proprietary harm*.[16]

The Court next commented on this issue in *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956). In *Rex Trailer*, this Court ruled -- in the context of a non-FCA case -- that specific, quantifiable damages need not be proven in every case in which some pecuniary or proprietary injury is plainly evident. The defendants in *Rex Trailer* violated a statute which provided damages and penalties similar to that of the FCA by falsely using the names of veterans in order to purchase government-owned trucks. The defendants argued that the government suffered no harm because they had paid the

[16] After *Gilliland*, this Court again reiterated that defrauding the government meant committing a *pecuniary or proprietary* crime -- *i.e.*, a plundering of the Treasury -- in *Bridges v. United States*, 346 U.S. 209 (1953). In that case, this Court held that the Wartime Suspension of Limitations Act, which suspended the statute of limitations to permit the government to prosecute wartime frauds committed by government contractors, did not apply to false statements about Communist Party membership made to obtain a Certificate of Naturalization. This Court ruled that the 1942 version of the Wartime Suspension of Limitations Act -- which applied generally "to offenses involving the defrauding or attempts to defraud the United States . . ." -- did *not* apply to the false *statements* provision of the 1934 criminal FCA amendments addressed in *Gilliland*, *id.* at 220-21. Rather, it applied only to "the defrauding of the United States in any *pecuniary manner or in a manner concerning property*." *Id.* at 221 (emphasis added).

government's offering price for the vehicles. The government, however, was not disposing of the trucks as a commercial vendor, but as a benefits package for war veterans and a source of trucks for other government agencies. *Id.* at 150. The statute gave veterans a priority opportunity to buy the trucks at favorable prices and credit terms, which constituted "benefits" of "great value" because the government's surplus of such trucks was limited, *id.*, and a severe shortage of civilian vehicles was causing non-veteran truck purchasers to suffer black and gray market conditions. *United States v. Rex Trailer Co.*, 218 F.2d 880, 884 (7th Cir. 1955), *aff'd*, 350 U.S. 148 (1956). The government thus suffered proprietary harm when the defendants swindled it out of the trucks it had *earmarked and priced* as part of a benefits package intended for a specific class of beneficiaries. Moreover, because government agencies had second priority after veterans under the statute, "the government did sustain injury due to the . . . decrease of motor vehicles available to Government agencies" that resulted from the defendants' fraud. *United States v. Halper*, 490 U.S. at 445 (emphasizing that *Rex Trailer* imposed penalties as liquidated damages for *actual financial loss to the government*).[17]

Even instances of fraud with potential -- but still inchoate -- fiscal ramifications do not fall within the scope of the FCA. In *United States v. McNinch*, 356 U.S. 595 (1958), this Court held that the civil False Claims Act does not impose liability for a false application for credit insured by the Federal Housing Authority ("FHA"). Officers of a home construction business had submitted fictitious credit reports and

[17] In the course of making the uncontroversial observation that specific damages (as opposed to harm) need not be shown, *Rex Trailer* also appears to suggest in dicta that a showing of actual harm was not necessary. *See* 350 U.S. 148, 153 n.5. This Court's decision in *Halper*, however, emphasized that actual harm was in fact shown in both *Hess* and *Rex Trailer*. *See* 490 U.S. at 444-46. Moreover, *Rex Trailer* addressed a claim under the Surplus Property Act of 1944, 40 U.S.C. § 489, not the FCA.

misrepresented the financial eligibility of certain homeowners for loans backed by the FHA. *Id.* at 597 & n.4. Because there was no default at issue, this Court did not decide whether a lending institution's claim for reimbursement on a defaulted loan procured by fraud would constitute a claim covered by the FCA. *Id.* at 599 n.6. The Court did hold, however, that the fraudulent credit applications themselves did not fall within the scope of the FCA because "[i]n agreeing to insure a home improvement loan *the FHA disburses no funds nor does it otherwise suffer immediate financial detriment.* It simply contracts, for a premium, to reimburse the lending institution in the event of future default, if any." *Id.* at 599 (emphasis added). The Court concluded in *McNinch* that while "Congress wanted to stop . . . plundering of the public treasury, . . . it is equally clear that *the False Claims Act was not designed to reach every kind of fraud practiced on the United States.*" *Id.* (emphasis added).[18]

Finally, in *United States v. Halper*, 490 U.S. 435 (1989), the Court addressed the issue of whether the Double Jeopardy Clause prohibited the imposition of grossly disproportionate penalties under the civil False Claims Act after the defendant had previously been convicted of criminal false claims for the same fraudulent submissions. In *Halper*, there was no question that the defendant had caused a financial loss to the Federal treasury. In that context, the Court held that allegedly "civil" penalties of $130,000 were so "grossly disproportionate" to the loss to the Treasury ($585) that imposition of those so-called "civil" penalties was punitive and thus barred by the Double Jeopardy Clause. The Court in *Halper* summed up this Court's holdings in *Hess* and *Rex Trailer* as follows:

[18] In *United States v. Neifert-White Co.*, 390 U.S. 228 (1968), False Claims Act liability attached when federal money was loaned in reliance of a fraudulent loan application because, unlike *McNinch*, the defendant made "a false statement with the purpose and effect of inducing the Government immediately *to part with money*." *Id.* at 232 (emphasis added).

> The relevant teaching of these cases is that the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis. These cases do not tell us, because the problem was not presented in them, what the Constitution commands when one of those imprecise formulas authorizes a supposedly *remedial sanction that does not remotely approximate the Government's damages and actual costs*, and rough justice becomes clear injustice.

490 U.S. at 446 (emphasis added). The Court's analysis in *Halper*, as in *Hess* and the prior decisions, assumed that some substantial financial loss to the Federal treasury had occurred, and that the damages and penalty provisions of the False Claims Act were designed to reimburse the government for these actual losses. In this long line of cases, the False Claims Act has not been applied when a regulatory violation or other false statement results in no financial loss to the Federal treasury.

B. The Court Of Appeals Holding Misinterprets The Language Of The Act And This Line Of Decisions

Notwithstanding the century-old understanding that False Claims Act liability is triggered only by *pecuniary* or *proprietary* harm, the Ninth Circuit ruled below that despite a showing that Hughes' regulatory violation cost the government *nothing*, such violation "creates a genuine issue of material fact relating to a violation of the False Claims Act." *United States ex rel. Schumer v. Hughes Aircraft, Co.*, 63 F.3d 1512, 1525 (9th Cir. 1995). The Ninth Circuit, purporting to rely on this Court's decision in *Rex Trailer Co. v. United States*, 350 U.S. 148, held that "the *lack of a determination of actual harm*

from the CAS violation does not preclude a claim under the FCA." *Schumer*, 63 F.3d at 1525 (emphasis added).

The Ninth Circuit misread *Rex Trailer*. Nothing in *Rex Trailer* converts the remedial civil False *Claims* Act into a punitive civil False *Statements* Act, which is the effective result of abandoning the FCA's requirement that liability attach only upon pecuniary or proprietary injury to the government. In *Rex Trailer*, a non-FCA case, the government suffered financial loss because surplus government property designed to be sold either to veterans or to other government agencies was instead purchased by persons not eligible to receive the benefit. Rather than trying to prove specific damages (by, for example, estimating the difference between market prices and credit terms and the government surplus prices and terms) the government simply requested penalties under the statute's civil penalties provision. This Court ruled in *Rex Trailer* that the civil penalties provision properly served to remedy the actual harm to the government by functioning as liquidated damages; it did *not penalize* the defendants for falsity which caused *no actual harm*.[19] In contrast, the Court of Appeals decision at issue here concludes that Hughes should be penalized under the False Claims Act for an alleged violation of an accounting regulation which saved the government money. The only actual harm

[19] An example of applying penalties to reimburse the government for actual losses that are difficult to quantify is *United States v. Advance Tool Co.*, 902 F. Supp. 1011 (W.D. Mo. 1995), *aff'd*, 86 F.3d 1159 (8th Cir. 1996). In *Advance Tool*, the defendant sold the government tools which did not meet certain required contract specifications, but were used by the government. Because of the difficulty of locating the nonconforming tools, the court found that the government could not prove actual damages, even though the government did prove that the nonconforming tools provided by the defendant were not as valuable as the tools that met specifications. The court, however, imposed civil penalties as a form of rough justice to compensate for the government's actual -- but unproven -- financial loss.

Schumer alleges is that the government paid the auditors who investigated Hughes. *See* Opp. at 11-12.

When the *only* concrete harm that Schumer can allege is the cost of the same government investigation which prompted the government to withdraw its finding of noncompliance, he is essentially asking this Court to convert the FCA into a civil False Statements Act designed to fund Federal auditors. To apply civil penalties in the absence of any financial loss, relying solely on routine investigative and audit costs, would divorce the FCA from its remedial purpose. The False Claims Act was intended "to provide restitution to the government of money taken from it by fraud," and Congress included civil penalties only to "*make sure* that the government would be made completely whole." *United States ex rel. Marcus v. Hess*, 317 U.S. at 552-53 (emphasis added).[20]

The FCA was not intended to "remedy" the cost of routine government functions; rather, it was intended to remedy the cost of contractors swindling the government. Civil penalties may serve a remedial purpose when applied to make

[20] A recent criminal mail fraud case in the healthcare context illustrates well the principle that even a violation of a criminal regulatory statute does not necessarily constitute fraud. In *United States v. Jain*, 93 F.3d 436, No. 95-2014, 1996 WL 444885 (8th Cir. Aug. 8, 1996), Dr. Jain, a psychologist, was convicted of violating both the mail fraud statute, 18 U.S.C. § 1341 and the Medicare Anti-Kickback Act, 42 U.S.C. § 1320a-7b, by soliciting and receiving kickbacks for referring Medicare patients to a hospital for psychiatric care. The evidence at trial showed, and the government eventually conceded, that the patients were appropriately hospitalized, and several government witnesses testified that the hospital was "likely the best acute-care psychiatric hospital in the region." *Id.* at *2. In short, there was no evidence that the patients received substandard or unnecessary care, or that the government paid a penny more than it would have paid in the absence of Dr. Jain's kickback scheme. *Id.* Although the Eighth Circuit affirmed his conviction under the Anti-Kickback Act, it held that because there was no financial loss to the government, Dr. Jain's illegal kickback scheme did not constitute mail fraud, and the mail fraud conviction was reversed. *See id.* at *4-*6.

sure that the treasury has received full restitution -- including restitution for ancillary costs of fraud -- but such penalties can only be described as punitive when applied to penalize a harmless failure to disclose accounting methods. Absent some actual loss, there is nothing to remedy. It is clear, and this Court has repeatedly recognized, that the FCA is intended to remedy harm caused by fraud and that Congress never intended for the FCA to penalize false statements resulting in no financial loss in order to fund the payroll for government auditors and accountants.

While government contractors and others who receive or spend Federal funds may violate government laws and regulations, it simply does not follow that such regulatory violations defraud the government when they cause no harm to the public fisc. *Amici* strongly urge this Court to state -- yet again, as it has repeatedly since the adoption of the Act -- that the civil False Claims Act serves the remedial function of recouping the government's actual pecuniary and proprietary losses caused by fraud, and does not serve as an enforcement mechanism for other statutes, or as a means of punishing all false statements somehow connected to the government's procurement of goods and services. To impose such civil penalties when there has been no loss to the Federal treasury is not remedial and is not justified by the language or the purpose of the FCA. However, such is the effect of the Ninth Circuit's ruling below. Accordingly, the Ninth Circuit's opinion below should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDICES

U.S. DEPARTMENT OF JUSTICE

FOR IMMEDIATE RELEASE
WEDNESDAY, OCTOBER 18, 1995

CIV
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JUSTICE DEPARTMENT RECOVERS OVER $1 BILLION IN QUI TAM AWARDS AND SETTLEMENTS

WASHINGTON, D.C. — The Department of Justice has recovered more than $1 billion in civil fraud cases brought under the whistleblower provisions of the False Claims Act since they were amended in 1986.

Frank W. Hunger, Assistant Attorney General for the Civil Division, praised the work of Senator Charles Grassley of Iowa and Representative Howard L. Berman of California in announcing the figure today. Grassley and Berman sponsored the 1986 whistleblower provision, also know as the *qui tam* amendments to the False Claims Act, which significantly strengthened the statute.

The statute allows a citizen, also known as a "relator," to file suit on behalf of the United States alleging that a person has submitted false or fraudulent claims on the United States. The government has a period of time to investigate the allegations to determine whether to take over the suit or allow the private citizen to pursue it alone. The private citizen may recover from 15 percent to 25 percent of the settlement or judgment if the government takes over the case and prosecutes it successfully and the same amount if the whistleblower litigates the case.

"This is a remarkable achievement for the taxpayers of this country," said Hunger. "Senator Grassley and Representative Berman must be commended for their leadership and

vision in sponsoring the legislation that has been used so effectively in the nine years since its enactment.

"The recovery of over $1 billion demonstrates that the public-private partnership encouraged by the statute works and is an effective tool in our continuing fight against fraudulent use of public funds."

Of the total amount recovered since 1986, the Department intervened in or settled cases resulting in recoveries of $1,058,177,552. Relators, or "whistleblowers," have been awarded $184,470,378 or 17.87 percent of the government's proceeds where shares have been determined.

In cases declined by the government, private citizens obtained settlements or judgments of $15,597,141. Their shares have averaged 28 percent of the proceeds where shares have been determined, or $3,412,661.

"The *qui tam* amendments were intended to encourage private citizens to come forward with information about fraud against the federal government," said Hunger. "Obviously they are working very well.

"These recoveries could not have been achieved without the outstanding and tireless efforts of the attorneys in the Civil Division and the U.S. Attorneys' offices throughout the country working in cooperation with agency investigators," Hunger stressed.

The largest *qui tam* recovery to date was a $150 million agreement with United Technologies Corporation to settle a lawsuit filed by a former vice president of finance alleging that the company overstated progress payments submitted by its Sikorsky Aircraft Division and misrepresented the facts in reporting the fraud to the government through the Department of Defense's Voluntary Disclosure Program. The relator received $22.5 million, the largest recovery by a whistleblower to date.

Other significant cases include a $112.5 million agreement with Teledyne Inc. to settle two *qui tam* cases involving

Teledyne's former Relays Division and Teledyne Systems Company. The government charged the company with fraud in testing military components and in its costs accounting practices.

An $88 million settlement on September 30 with Lucas Industries pushed *qui tam* recoveries over $1 billion. That settlement resolved a *qui tam* lawsuit filed in Utah that alleged that Lucas defrauded the government by providing defective military parts and falsifying testing and quality control reports.

Attached are *qui tam* statistics through fiscal 1995.

QUI TAM STATISTICS

Number of *qui tam* cases filed at end of fiscal 1995: 1,105

Number where a recovery has been obtained under the False Claims Act: 153

Qui Tam Filings By Fiscal Year:

FY 87 -33 cases
FY 88 -60 cases
FY 89 -95 cases
FY 90 -82 cases
FY 91 -90 cases
FY 92 -119 cases
FY 93 -131 cases
FY 94 -221 cases
FY 95 -274 cases

Qui Tam Recoveries (approximate):

FY 88 -$ 2 million
FY 89 -$32 million
FY 90 -$40 million
FY 91 -$36 million

FY 92 -$124 million
FY 93 -$193 million
FY 94 -$379 million
FY 95 -$243 million

Total fraud recovery from FY 87 through FY 95: $3, 342, 390, 684
(qui tam recoveries are about one-third of total)

Defense fraud and health care fraud recoveries, as percentages of total recoveries:

FY 87-37% defense fraud, 16% health care fraud
FY 88-85% defense fraud, 1% health care fraud
FY 89- 79% defense fraud, 8% health care fraud
FY 90-65% defense fraud, 3% health care fraud
FY 91-83% defense fraud, 4% health care fraud
FY 92-70% defense fraud, 5% health care fraud
FY 93-29% defense fraud, 46% health care fraud
FY 94-53% defense fraud, 38% health care fraud
FY 95-48% defense fraud, 36% health care fraud

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95-542

DEPARTMENT OF HEALTH & HUMAN SERVICES
Office of Inspector General

Washington, D.C. 20201

June 21, 1996

Jordan J. Cohen, M.D.
President Association of American Medical Colleges
2450 N. Street, N.W.
Washington, D.C. 20037

Dear Dr. Cohen:

The purpose of this letter is to apprise you of activities in my office that may be of interest and concern to members of your organization. Specifically, the Department of Health and Human Services, Office of Inspector General (OIG), has initiated a series of nationwide reviews of compliance with rules governing physicians at teaching hospitals (PATH) and other Medicare payment rules. This initiative grows out of the extensive work performed by the OIG at a major east coast university. The focus of the review was compliance with Intermediary Letter 372 (IL 372), the Medicare rule affecting payment for physician services provided by residents. We found that the institution was not complying with this rule. We also found that teaching physicians were improperly "upcoding" the level of service provided in order to maximize Medicare reimbursement. This review resulted in the Government's recovery of more than $30 million, including damages under the Federal Civil False Claims Act. As part of the negotiated settlement, the responsible parties also avoided program exclusion under the OIG's authorities.

The OIG has initiated the PATH project in order to determine whether, and to what extent, similar problems are present at other teaching institutions throughout the country. The nationwide PATH reviews will focus on compliance with IL 372 and the appropriateness of service codes. In addition, the OIG encourages physician group practices affiliated with teaching hospitals to examine their own practices under these Medicare requirements. Interested group practices that choose to participate actively in such a process, under a protocol established by the OIG, may potentially reduce their legal exposure, if any, under the OIG's exclusion authorities.

Active participation includes arrangement, at the party's expense, for an independent review conducted by a third party, using the OIG's review protocol. A prospective party must be an institution that receives graduate medical education payments under Medicare Part A. To receive the benefits of active participation in a PATH review, a party must adhere to principles set out in the review protocol, such as the following:

- The party will not engage, for the purposes of the independent review, any individual or entity that has previously provided advice or consultation to the party with respect to the matter under review.
- The party will waive any privileges or other rights to withhold any documents, as requested by the Government and relating to the review, including documents otherwise protected by the attorney-client privilege and the work product doctrine.
- The Government will receive all draft reports of the independent review concurrently with the party, and the party will afford the Government the opportunity to be present for any discussions with the reviewer relating to the review.

- The party understands that the Government reserves the right to conduct its own review, of any scope, during the pendency of the review process, and to refer matters when appropriate to other Federal authorities such as the Department of Justice.

The OIG will give favorable treatment, to the degree permitted by law, to the party's bona fide participation and cooperation under the protocol. Favorable treatment may include:

- generally crediting the independent reviewer's reasonable and verifiable damages estimate for the purposes of determining overpayment;
- according substantial weight to the level of participation and cooperation in determining whether to exclude the party under the OIG's exclusion authorities; and
- making the party's level of participation and cooperation known to other Federal officials in the event that the OIG's statutory obligations require referral to the matter under review.

We are writing to inform you about our activities under PATH because some of your members may be interested in participating and working with us to resolve any issues that may arise under a PATH review.

The OIG is committed to working with responsible parties to resolve their liabilities relating to the matters under review, if any, and to assure future compliance with Medicare laws,

regulations and payment rules. Parties interested in actively participating in the PATH reviews should contact:

Ms. Ellen Bechkes, Audit Manager
Department of Health and
Human Services
Office of Inspector General
Office of Audit Services
N2-25-26
7500 Security Boulevard
Baltimore, MD 21244-1850
(410) 786-7104

Thank you for your assistance in notifying your members of our work in this area.

Sincerely,

/s/

June Gibbs Brown
Inspector General

Supreme Court, U.S.
FILED
NOV 27 1996
CLERK

(16)

No. 95-1340

In the Supreme Court of the United States

OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY,
Petitioner,
v.
UNITED STATES EX REL. WILLIAM J. SCHUMER,
Respondent.

On Writ of Certioriari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NORTHROP GRUMMAN CORPORATION IN SUPPORT OF PETITIONER HUGHES AIRCRAFT COMPANY

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No. 95-1340

In the Supreme Court of the United States

OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY,
Petitioner,
v.
UNITED STATES EX REL. WILLIAM J. SCHUMER,
Respondent.

On Writ of Certioriari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NORTHROP GRUMMAN CORPORATION IN SUPPORT OF PETITIONER HUGHES AIRCRAFT COMPANY

Pursuant to Supreme Court Rule 37.3, *amicus curiae* Northrop Grumman Corporation respectfully submits this brief urging this Court to reverse the judgment of the Court of Appeals in this case and to hold that section 3 of the False Claims Amendments Act of 1986,[1] which eliminated the "prior government knowledge" defense to a *qui tam* action under the False Claims Act, does not apply retroactively to a case in which the government acquired its knowledge of the relevant allegations prior to the enactment of the amended statute.

[1] *See* Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3154 (Oct. 27, 1986) (amending 31 U.S.C. § 3730).

This brief is filed with the consent of both petitioner and respondent, and letters reflecting those consents have been lodged with the Clerk of this Court.

INTEREST OF *AMICUS CURIAE*

Amicus curiae Northrop Grumman Corporation ("Northrop") has a direct interest in the outcome of this case because Northrop currently has pending before this Court a petition for a writ of certiorari raising a virtually identical issue concerning the retroactivity of the 1986 amendments to the False Claims Act ("FCA"). *See* Pet. for a Writ of Cert., *Northrop Grumman Corporation v. United States ex rel. Michael A. Hyatt*, No. 96-17 (filed July 2, 1996) ("*Hyatt* Pet.").

In the *Hyatt* case, former Northrop employee Michael A. Hyatt filed a complaint against Northrop under the *qui tam* provisions of the FCA on October 3, 1986 — *i.e.*, more than three weeks *before* the amended FCA was enacted on October 27, 1986. *See Hyatt v. Northrop Corp.*, 80 F.3d 1425, 1427 (9th Cir. 1996). At the time of filing, all of the allegations raised in the *Hyatt* complaint already were known to the government, in part because of voluntary disclosures made by Northrop after conducting internal investigations. *Hyatt* Pet. at 2-3.

After reviewing Hyatt's complaint, the United States government declined to intervene. Instead, the government filed a brief in the district court arguing that Hyatt's *qui tam* claim was barred by the "prior government knowledge" defense set forth in 31 U.S.C. § 3730(b)(4) (1982), which provided that a *qui tam* action shall be dismissed if it is "based on evidence or information the Government had when the action was brought." *See Hyatt*, 80 F.3d at 1427. The government acknowledged that this defense had been repealed when § 3730 was completely rewritten by the FCA amendments that took effect on October 27, 1986, but the

government argued that this repeal could not be applied retroactively to a case filed before that date. *See Hyatt* Pet. at 4-5 (citing government's brief). After Northrop and Hyatt filed briefs respectively supporting and opposing the government's position, the district court held that the amended § 3730 could not be applied retroactively and that Hyatt's *qui tam* suit therefore was barred by the prior government knowledge defense. *Hyatt v. Northrop Corp.*, 1988 WL 156739 (C.D. Cal. 1988).

The Ninth Circuit, relying on the decision challenged here by petitioner Hughes Aircraft Company, reversed the district court's holding that the amended § 3730 does not apply retroactively. *Hyatt v. Northrop Corp.*, 80 F.3d 1425 (9th Cir. 1996). The Court of Appeals stated that "*Schumer* compels our holding that [the amended § 3730] applies retrospectively . . . ." *Id.* at 1430 (citing *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512 (9th Cir. 1995)). Consistent with its earlier decision in *Schumer*, the *Hyatt* court held that application of the amended version of § 3730 generally would not have a "retroactive effect" within the meaning of this Court's decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). *See Hyatt*, 80 F.3d at 1428-29. The court reasoned that the amended § 3730 would not alter the "underlying" liability of the contractor and that, in any event, the new statute was a "jurisdictional" provision that must be presumed to apply retroactively. *Id.*

The facts in *Hyatt* differ from those in *Schumer* in at least one critical respect: unlike the complaint in *Schumer*, the complaint in *Hyatt* was filed *before* the enactment of the amended statute on October 27, 1986. *Hyatt*, 80 F.3d at 1429. Accordingly, in responding to Hyatt's appeal to the Ninth Circuit, Northrop asserted that, at a minimum, the amended § 3730 could not be applied retroactively to a case filed before that date. Specifically, Northrop argued that the

various *qui tam* provisions of the amended § 3730 were not severable from one another and that, because portions of that section (such as the new requirement that the *qui tam* complaint must be filed initially under seal) obviously could not be applied retroactively, Congress intended that none of the *qui tam* amendments would be applied to an action that already had been filed. 80 F.3d at 1429-30. The Ninth Circuit rejected this argument, concluding that, because this Court in *Landgraf* had applied a section-by-section retroactivity analysis to the Civil Rights Act of 1991, a similar approach was warranted in *Hyatt*. *Id.*

On July 2, 1996, Northrop filed a petition for a writ of certiorari in this Court challenging the Ninth Circuit's holding in *Hyatt* that the 1986 amendments to the *qui tam* provisions of the FCA could be applied retroactively to a case in which all of the conduct occurred — and the lawsuit was filed — before the enactment of the amended statute. *See Hyatt* Pet. at 8-16. Because a decision by this Court reversing the Ninth Circuit on the retroactivity issue in *Schumer* would fatally undermine the Ninth Circuit's decision in *Hyatt*, Northrop has a direct interest in the outcome of this case.

Northrop agrees that, for the reasons stated in the brief of petitioner Hughes Aircraft Company ("Hughes"), the Ninth Circuit erred in applying the amended § 3730 retroactively in *Schumer*. In accordance with this Court's Rule 37.1, Northrop will not repeat those arguments here and instead respectfully submits this brief as *amicus curiae* in order to present this Court with two additional, alternative approaches to analyzing the retroactivity issue in *Schumer*.[2]

[2]Both of the alternative approaches described below would require reversal of the Ninth Circuit's judgment in *Hyatt*, but only the first would support a reversal in the instant case. Specifically, if this Court were to conclude — as set forth in the second approach discussed below — that the amended FCA should not be applied to *qui tam* suits filed *before* the enactment of the amended statute, that would not support reversal on this issue in *Schumer*, because the *qui tam* suit against petitioner was filed *after* that enactment.

SUMMARY OF THE ARGUMENT

Under this Court's decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994), a statute should not be applied to have retroactive effect absent clear congressional intent. A statute has a "retroactive effect" in a particular context if its application would "attac[h] new legal consequences to events completed before its enactment." *Id.* at 269-70. Prior to its amendment, § 3730 attached an important legal consequence to the fact that the government had knowledge of a particular FCA allegation — a *qui tam* suit based on that allegation was completely barred. *See* 31 U.S.C. § 3730(b)(4) (1982). By repealing this "prior government knowledge" defense, the amended § 3730 would have the retroactive effect of attaching new legal consequences to pre-enactment conduct in any case where the government acquired its knowledge of the relevant allegations before the new statute was enacted. Because the government was aware of the allegations at issue in this case before the statute was amended and before respondent Schumer filed suit, the Ninth Circuit erred in applying the new statute retroactively.

The Ninth Circuit declined to apply *Landgraf*'s presumption against retroactivity, holding that *Landgraf* "carved out an exception to that rule in the case of jurisdictional statutes." Pet. App. 6a. This conclusion was error. *Landgraf* notes that this Court's practice of "regularly appl[ying] intervening statutes conferring or ousting jurisdiction" is consistent with the presumption against retroactivity precisely *because* application of such statutes "usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' " 511 U.S. at 274 (citation omitted). *Landgraf* thus makes clear that its jurisdictional

"exception" extends only to those statutes that change the relevant tribunal without extinguishing substantive rights altogether. But in that sense, jurisdictional statutes reflect, not an "exception" to the normal rule, but an *application* of it: they are an identifiable class of statutes in which, under the standard principles set forth in *Landgraf*, there *ordinarily* will be no "retroactive effect."

In any event, the amended § 3730 is *not* a "jurisdictional" provision within the meaning of *Landgraf*. In concluding that the amended § 3730 is jurisdictional for retroactivity purposes, the Ninth Circuit relied *solely* on the fact that the relevant subsection uses the magic word "jurisdiction." Under *Landgraf*, however, a jurisdictional provision is one that " 'speak[s] to the power of the court rather than to the rights or obligations of the parties.' " 511 U.S. at 274 (citation omitted). Here, despite the use of "jurisdictional" language, the amended § 3730 addresses, not the authority of courts, but the respective *substantive* rights of the contractor, the *qui tam* relator, and the United States.

The Ninth Circuit also erred in concluding that, because the amended § 3730 does not alter the underlying obligation of the contractor not to commit fraud, it would not have a retroactive effect. The Court of Appeals' conclusion on this point is flatly inconsistent with *Landgraf*'s holding that § 102 of the Civil Rights Act of 1991, which authorized the recovery of compensatory damages in Title VII cases, did not apply retroactively despite the fact that § 102 did "not make unlawful conduct that was lawful when it occurred." 511 U.S. at 281-82. Moreover, under the general principles set forth in *Landgraf*, a statute has retroactive effect, not only if it would "impose new duties with respect to transactions already completed" (thereby altering the "underlying liability"), but *also* if application of the statute would "impair rights a party possessed when he acted" or "increase a party's liability for past conduct." *Id.* at 280. Application

of the amended § 3730 has both these latter effects: by reviving a barred cause of action, it eliminates a defense and increases petitioner's liability.

The Ninth Circuit's decision also ignores the fact that application of the new § 3730 would alter significantly the *government's* pre-existing rights under the FCA. In particular, as the government argued in *Hyatt*, retroactive application of the amended § 3730 would operate to deprive the government of its right to 100% of the recovery based on allegations previously known to it. Indeed, in several cases where the government has sought *independently* to pursue such previously known allegations, the government has successfully objected that retroactive application of the amended § 3730 would alter its pre-existing substantive rights. The fact that application of the amended § 3730 would have such an effect in many cases confirms that, under the *Landgraf* presumption, Congress did not intend the provision to apply retroactively at all.

For all of these reasons, this Court should reverse the judgment of the Ninth Circuit and hold that the FCA amendment's repeal of the "prior government knowledge" defense cannot be applied retroactively to a case, such as this one, in which the government acquired its knowledge of the allegations prior to the enactment of the amended statute.

Even if this Court were to determine that the amended § 3730 may be applied retroactively to the facts of the instant case, however, the Court should nonetheless make clear that a similar result would not obtain in a case in which the *qui tam* complaint was filed *before* the enactment of the amended FCA. Under the text of both the former and current versions of § 3730, the applicability of the *qui tam* bar is inextricably tied to the date of the filing of the suit. This fact strongly suggests that Congress intended, at a minimum, that the new version would not be applied to suits

filed before its enactment. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 838-39 (1990). Moreover, because the amended statute creates a dramatically different incentive structure that in many circumstances reverses what a relator must do to bring a *qui tam* suit, Congress clearly did not intend for the statute to govern suits filed before the date of enactment. Finally, this construction of the statute is confirmed by the fact that the amended § 3730 contains several provisions (such as an under-seal filing requirement) that *cannot* be applied to a suit filed under the prior law; because the various provisions of that section are *not* severable from one another, no portion of it should be applied retrospectively to a suit filed before enactment.

ARGUMENT

A. The Amended FCA's Elimination of the "Prior Government Knowledge" Defense to a *Qui Tam* Action Cannot Be Applied Retroactively to a Case in Which the Government Acquired Its Knowledge Prior to the Enactment of the Amended Statute

In *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994), this Court held that, absent clear congressional intent, a statute should not be applied to have retroactive effect. A statute has a "retroactive effect" in a particular context if its application would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* In short, "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-70. Application of these principles makes clear that the amended § 3730, by eliminating the "prior government knowledge" defense, has a retroactive effect within the meaning of *Landgraf*.

1. Application of the Amended § 3730 in the Instant Case Would Have a "Retroactive Effect" Within the Meaning of *Landgraf*

In order to determine whether a subsequently enacted federal statute would attach new consequences to preenactment conduct, one must first identify the relevant conduct that would be affected by the application of the new statute. *Landgraf*, 511 U.S. at 269-70, 280; *see also id.* at 291 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in the judgment) (stating that the "critical issue" is "what is the relevant activity that the rule regulates"). Here, the conduct that is affected by the amendment of § 3730 is the disclosure of information to the government. *See United States ex rel. Anderson v. Northern Telecom, Inc*, 52 F.3d 810, 814-15 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 700 (1996). That is, prior to its amendment, § 3730 attached an important legal consequence to the fact that the government had knowledge of a particular FCA allegation—a *qui tam* suit based on that allegation was completely barred, even if the *qui tam* relator was the source of the government's prior knowledge. *See* 31 U.S.C. § 3730(b)(4) (1982); *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1103-06 (7th Cir. 1984); *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 669-73 (9th Cir. 1978). Moreover, by precluding *qui tam* liability for any conduct that was known to the government, § 3730 provided a significant additional incentive for federal contractors to make full, voluntary disclosures to the government. *See* Waldman, *The 1986 Amendments to the False Claims Act: Retroactive or Prospective?*, 18 Pub. Cont. L.J. 469, 481 (1989). Thus, a contractor could avoid the burden of a strike suit brought by a disgruntled *qui tam* relator simply by keeping the govern-

ment informed about issues and problems that might arise during the performance of the contract.[3]

The new § 3730 significantly alters the legal consequences of the government's prior knowledge in two important respects: (1) it no longer bars *qui tam* suits based on allegations known to the government at the time the suit was filed; and (2) if the allegations have been "public[ly] disclos[ed]," then only an "original source" of the allegations may bring a *qui tam* suit, and any such putative relator is *required* to disclose the allegations to the government *before* bringing suit. 31 U.S.C. § 3730(e)(4) (1988). In view of these changes, the amended § 3730 would have the retroactive effect of "attach[ing] new legal consequences" to pre-enactment conduct in any case where the government acquired its knowledge of the relevant allegations before the new statute was enacted.

This analysis makes clear that the amended § 3730 would have a retroactive effect in the instant case. The Ninth Circuit expressly assumed, for purposes of its decision, that the government was aware of the allegations in Schumer's complaint *before* the enactment of the 1986 amendments. Pet. App. 6a, n.1. Accordingly, under the version of the FCA in effect at the time the government acquired this knowledge, Schumer's *qui tam* action was barred. 31 U.S.C. § 3730(b)(4) (1982); *Dean*, 729 F.2d at 1103-06; *Pettis*, 577 F.2d at 669-73. Application of the amended version of the FCA would lift this bar and allow Schumer's *qui tam* suit to go forward, thereby "attach[ing] new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. As such, the new statute would have a "retroactive effect" and must not be applied absent clear

[3] In *Hyatt*, for example, Northrop informed the government about routine development problems and, when two specific issues arose, Northrop conducted internal investigations and disclosed the results of those investigations to the government. *See Hyatt* Pet. at 2-3.

congressional intent. Because "Congress did not demonstrate an intent that the FCA [amendments] should apply retrospectively," Pet. App. 6a, the amended § 3730 may not be applied in the instant case.

2. The Ninth Circuit's Reasons for Retroactively Applying the Amended § 3730 to This Case Are Fatally Flawed

In reaching a contrary conclusion, the court below did not (and could not) dispute that application of the amended § 3730 significantly altered the legal consequences of the pre-amendment disclosures of information to the government. The Ninth Circuit, however, declined to apply *Landgraf's* presumption that "a statute altering substantive rights applies only prospectively," holding that *Landgraf* "carved out an exception to that rule in the case of jurisdictional statutes." Pet. App. 6a. In construing the scope of this "exception," the Court of Appeals read *Landgraf* as establishing a "strong presumption that jurisdictional statutes apply retrospectively" and held that this latter presumption can be rebutted only by a showing that retroactive application would "infringe on the substantive rights of the defendant" by "'alter[ing] [the defendant's] underlying liability.'" Pet. App. 7a (quoting *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1408 (9th Cir. 1995)); *see also Lindenthal*, 61 F.3d at 1408 (concluding that the amended statute was a "jurisdictional" rule that "simply did not alter [the defendant's] underlying obligation not to commit fraud upon the government.").

As set forth below, the Ninth Circuit's analysis is fatally flawed in at least four separate respects.

a. Under *Landgraf*, "Jurisdictional" Provisions Are Governed by the Same Retroactivity Principles As Other Legislation

As a threshold matter, the Ninth Circuit was simply wrong in reading *Landgraf* as "carv[ing] out an exception" to the normal presumption against retroactivity and as creating a counter-presumption *in favor* of retroactivity for "jurisdictional" statutes. On the contrary, *Landgraf* makes clear that jurisdictional statutes are governed by exactly the same retroactivity principles as other legislation.

In the portion of the opinion relied upon by the Ninth Circuit, *Landgraf* notes that this Court's practice of "regularly appl[ying] intervening statutes conferring or ousting jurisdiction" is consistent with the presumption against retroactivity precisely *because* application of such statutes "usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" 511 U.S. at 274 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). In other words, "[p]resent law *normally* governs in such situations because jurisdictional statutes 'speak to the power of the court *rather than to the rights or obligations of the parties.*'" *Id.* (quoting *Republic National Bank v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)) (emphasis added). *Landgraf* thus makes clear that its jurisdictional "exception" extends only to those statutes that change the relevant tribunal without extinguishing substantive rights altogether.[4] But in that sense,

[4]Indeed, every case cited by *Landgraf* as involving a "jurisdictional" amendment is consistent with this rule. *See Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 607-08 n.6 (1978) (although prior basis for jurisdiction was held invalid by this Court in 1977, a 1976 statute could be applied to save jurisdiction over suit, which "appeared jurisdictionally correct when filed"); *United States v. Alabama*, 362 U.S. 602, 604 (1960) (new statute expanded class of persons who could be sued but action was only for prospective relief); *Bruner v. United States*, 343

jurisdictional statutes reflect, not an "exception" to the normal rule, but an *application* of it: they are an identifiable class of statutes in which, under the standard principles set forth in *Landgraf*, there *ordinarily* will be no "retroactive effect."[5]

Application of those standard principles in the instant case compels the conclusion that Hughes' substantive rights would be retroactively altered if the amended § 3730 were applied here. The new statute does not reassign a claim from

U.S. 112, 117 (1952) (change of law "has not altered the nature or validity of petitioner's rights or the Government's liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities"); *Hallowell v. Commons*, 239 U.S. 506, 508 (1916) (statutory reassignment of claim from judicial to administrative forum "takes away no substantive right, but simply changes the tribunal that is to hear the case"); *Stephens v. Cherokee Nation*, 174 U.S. 445, 477-78 (1899) (statute granting new appellate rights did not "destro[y] any vested right" and language of the statute required it to be applied retrospectively); *The Assessor v. Osbornes*, 9 Wall. (76 U.S.) 567, 572-75 (1870) (repeal of federal jurisdiction over certain tax actions meant that such suits "must be commenced in the State Courts").

[5]The correctness of this reading of *Landgraf* is confirmed by the fact that Justice Scalia, writing separately in *Landgraf*, interpreted the Court's opinion in exactly the same way. He specifically objected to the majority's view that the Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction" is explained by the fact that such statutes "'tak[e] away no substantive right but simply chang[e] the tribunal that is to hear the case.'" 511 U.S. at 292 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in the judgment) (quoting maj. opin. at 274) (additional internal quotation marks and citation omitted). Justice Scalia argued, contrary to the *Landgraf* majority, that a "jurisdictional" statute *always* should be applied to "prevent *any* judicial action after the statute takes effect" even if doing so would destroy a substantive right. *Id.* at 292-93. That does not suggest, however, that the Ninth Circuit's decision here was correct under Justice Scalia's approach; on the contrary, that decision is still wrong for the additional reason that the amended § 3730 is *not* a "jurisdictional" provision within the meaning of either the majority or the concurring opinions in *Landgraf*. *See infra* at 14-15.

one tribunal to another without extinguishing substantive rights; on the contrary, it eliminates a pre-existing defense ("prior government knowledge") and reformulates a new one ("public disclosure"). Accordingly, even assuming *arguendo* that § 3730 *is* a "jurisdictional" provision, the Ninth Circuit erred in concluding that it could be applied retroactively in this case.

b. In Any Event, the Amended § 3730 Is Not a "Jurisdictional" Provision Within the Meaning of *Landgraf*

At any rate, the amended § 3730 is *not* a "jurisdictional" provision within the meaning of *Landgraf*. In concluding that the amended § 3730 is jurisdictional for retroactivity purposes, the Ninth Circuit relied *solely* on the fact that the relevant subsection uses the term "jurisdiction":

> Because the 1986 amendment explicitly effects a jurisdictional bar, *see* 31 U.S.C. § 3730(e)(4) ("No court shall have jurisdiction . . . "); *Wang v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir. 1992), we presume that it applies to the present action.

Pet. App. 7a (ellipses in original).

This "magic words" analysis is plainly deficient. As petitioner notes in its brief, Congress routinely expresses limitations on causes of actions or on available forms of relief in jurisdictional terms, but that, standing alone, does not imply that such provisions are "jurisdictional" in the sense described in *Landgraf*. In the *Landgraf* majority's view, a jurisdictional provision is one that "speak[s] to the power of the court rather than to the rights or obligations of the parties." 511 U.S. at 274 (citation and internal quotation marks omitted). The *Landgraf* concurrence similarly described jurisdictional provisions as being those whose "*purpose* . . . is to permit or forbid the exercise of judicial power," *id.* at 293 (Scalia, J., concurring) (emphasis added). These definitions make clear that not every statute that uses the magic word "jurisdiction" will be "jurisdictional" in the more narrow sense in which that term is used in the *Landgraf* opinions. For example, if Congress repealed a statute stating that "no court shall have jurisdiction to award punitive damages" and instead enacted a statute conferring such "jurisdiction," the resulting increase in the extent of the defendant's liability would unquestionably constitute a "retroactive effect" under *Landgraf*. *See* 511 U.S. at 281.

Here, despite the use of "jurisdictional" language, the amended § 3730 addresses, not the authority of courts, but the respective *substantive* rights of the contractor, the *qui tam* relator, and the United States. That is, by eliminating the "prior government knowledge" defense and thereby altering the circumstances in which a *qui tam* action may be maintained against a contractor, the amended statute is aimed, not at restricting the power of courts, but in reallocating rights among the various parties whose interests are at stake in *qui tam* actions.

c. *Landgraf* Makes Clear That the Amended § 3730 May Not Be Applied Retroactively Even Though It Does Not Alter the Underlying Obligations of the Contractor

The Ninth Circuit also erred in concluding that, because the amended § 3730 does not alter the underlying obligation of the contractor not to commit fraud, application of that provision here would not have a retroactive effect. Pet. App. 7a. The Ninth Circuit's conclusion on this point is flatly inconsistent with the holding of *Landgraf*. The *Landgraf* Court held that § 102 of the Civil Rights Act of 1991, which authorized the recovery of compensatory damages for "discriminatory conduct already prohibited by Title VII," did not apply retroactively *despite the fact that § 102 did "not make unlawful conduct that was lawful when it occurred."*

511 U.S. at 281-82 (emphasis added); *see also Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 303 (1994) (noting that, because § 102 expanded the applicable monetary liability, it could not be applied retroactively even though "it did not alter the normative scope of Title VII's prohibition on workplace discrimination").

Indeed, the general principles set forth in *Landgraf* make clear that an alteration of the underlying substantive obligation is not the only way in which a new statute may have a retroactive effect. Such an effect exists whenever a "new provision attaches new legal consequences to events completed before its enactment." 511 U.S. at 270. Accordingly, a statute has retroactive effect, not only if it would "impose new duties with respect to transactions already completed" (thereby altering the "underlying liability" in the manner described by the Ninth Circuit), but *also* if application of the statute would "impair rights a party possessed when he acted" or "increase a party's liability for past conduct." *Id.* at 280. Application of the amended § 3730 has both these latter effects: by reviving a barred cause of action, it eliminates a defense and increases petitioner's liability.[6] Thus, even if the amended § 3730 is construed as merely "giv[ing] a more efficient and a more complete remedy" for enforcing

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[6]The revival of Schumer's barred action is, for example, no less retroactive in its practical effect than the revival of a claim that is barred by the defense of limitations, and it is well established that, absent clear congressional intent, an amended statute of limitations "may not be applied retroactively to revive a claim that would otherwise be stale under the old scheme." *Chenault v. United States Postal Service*, 37 F.3d 535, 538 (9th Cir. 1994); *see also United States v. Kimberlin*, 776 F.2d 1344, 1347 (7th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986); *Herm v. Stafford*, 663 F.2d 669, 683 & n.20 (6th Cir. 1981); *cf. International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-44 (1976) (plain language of new provision expressed Congress' clear intent to revive time-barred actions then pending before the EEOC).

a pre-existing duty, the statute must not be applied retroactively where, as here, doing so would "tak[e] away material defenses, — defenses which did something more than resist the remedy; they disproved the right of action." *Winfree v. Northern Pacific Ry. Co.*, 227 U.S. 296, 301-02 (1913).

In *Hyatt*, the Ninth Circuit also held that the new *qui tam* provisions have no retroactive effect because any underlying liability could also be enforced through " 'an action brought directly by the government.' " 80 F.3d at 1429 (quoting *Lindenthal*, 61 F.3d at 1408). This argument, however, is based on the same assumption that a statute can have a retroactive effect only if it alters the "underlying liability"; because that premise is wrong, this argument likewise is unavailing.

Moreover, *Landgraf* expressly states that a statute may have a retroactive effect if it creates a new "mechanism that affects the liability of defendants." 511 U.S. at 282. That is exactly what the amended § 3730 does here. Because the government declined to pursue Schumer's allegations, application of the new § 3730 clearly would affect petitioner's liability because it is the *sole* determinant of whether petitioner will be haled into court in this case. Indeed, the Ninth Circuit's contrary view would lead to the utterly astonishing conclusion that there would be no "retroactive effect" were Congress retrospectively to create brand new *qui tam* causes of action to enforce pre-existing obligations under *other* federal statutes.[7]

---

[7]The elimination of the "prior government knowledge" defense "is also the type of legal change that would have an impact on private parties' planning." *Landgraf*, 511 U.S. at 282. Retroactively applying the new statute — especially in cases such as *Hyatt*, that were filed *before* the statute was amended — operates unfairly to deprive the contractor of the benefit derived from having taken the steps necessary to avoid a *qui tam* suit under the prior statute.

d. The Amended § 3730 Must Not Be Applied Retroactively Because It Alters the Substantive Rights of the Government

The Ninth Circuit also erred in failing to consider that retroactive application of the new § 3730 would alter significantly the *government's* pre-existing rights under the prior version of the FCA. In *Hyatt*, for example, the government vigorously argued in the district court that the amended § 3730 should not be applied retroactively, in part because it would interfere with the government's substantive rights:

> In the present case, . . . the lifting of the jurisdictional bar would result, if the relators are successful, in depriving the government of its right to 100% of the recovery based on allegations previously known to the government. Under the former False Claims Act, any allegations based on information previously disclosed to the government were reserved for the government alone. Even if the United States declined to enter an appearance it could, at a later time, institute a suit against the defendant based upon those allegations. Whatever recovery resulted was the government's alone. If the relators are now permitted to go forward with actions previously reserved for the government, the relators will also be permitted to share in the recovery. The government could not, at a later time, institute actions against the defendant based on the same conduct. The government would benefit by receiving a share of the recovery, of course, but would suffer to the extent that it would have to share its recovery with the relators.

Northrop's C.A. Excerpts of Record, *Hyatt v. Northrop Corp.*, Nos. 94-55578 & 94-55638, at 64-65 ("*Hyatt* E.R.") (quoting government's brief).[8]

The government's argument against retroactivity in *Hyatt* was not merely hypothetical. On the day before the government filed its brief seeking dismissal of Hyatt's *qui tam* suit, the government filed an *independent* FCA action raising one of the issues that had been contained in Hyatt's complaint. *Hyatt* E.R. 148, 302.[9] Similarly, in *United States v. TRW, Inc.*, 4 F.3d 417 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1370 (1994), the government intervened and took over the relators' *qui tam* suit and then moved to preclude the relators from sharing in any recovery the government might obtain, arguing that the relators' participation was barred by the "prior government knowledge" defense and that the amended statute could not be applied retroactively. *Id.* at 420.

The fact that application of the amended § 3730 plainly would alter the government's substantive rights confirms that, under the *Landgraf* presumption, Congress did not intend the provision to apply retroactively *at all*. Accordingly, the amended § 3730 may not be applied in the instant case even though the government did not interpose an objection in *Schumer* as it did in *Hyatt* and *TRW*.[10]

---

[8] In opposing a grant of certiorari in this case, the Solicitor General simply ignored this retroactive effect of the amended § 3730 and made no effort to explain why the government has now reversed its position on the retroactivity of that provision. *See* U.S. Br. re: cert. pet. at 7-10.

[9] Ultimately, the government's FCA suit was voluntarily dismissed after Northrop agreed to make a $45,050 adjustment to the contract price. *Hyatt* E.R. 300-07. In the agreement, Northrop expressly denied any wrongdoing in connection with these allegations. *Id.* at 305.

[10] At a minimum, however, this Court should hold that the amended § 3730 may not be applied retroactively in any case where the govern-

These four errors in the Ninth Circuit's opinion establish that that court erred in retroactively applying the amended § 3730 to this case. This Court should reverse the judgment of the Ninth Circuit and hold that the FCA amendments' repeal of the "prior government knowledge" defense cannot be applied retroactively to a case in which the government acquired its knowledge of the allegations prior to the enactment of the amended statute.

B. At A Minimum, the Amended FCA's Elimination of the "Prior Government Knowledge" Defense to a *Qui Tam* Action Cannot Be Applied Retroactively to a Case That Was Filed Prior to the Enactment of the Amended Statute

Even if this Court were to determine that the amended § 3730 may be applied retroactively to the facts of *Schumer*, the Court should nonetheless make clear that a similar result would not obtain in a case in which the *qui tam* complaint was filed *before* the enactment of the amended FCA. For several reasons, it is apparent that, at a minimum, Congress did not intend the amended § 3730 to apply retroactively to a case that was pending on the date that provision was enacted.

By focusing on the date that a *qui tam* suit is filed, the text of both the former and current versions of § 3730 reflect Congress' intent that the repeal of the "prior government knowledge" defense would not apply to suits filed before enactment of the amended statute. Under the prior statute, a *qui tam* action is barred if it is "based on evidence or information the Government had *when the action was brought.*" 31 U.S.C. § 3730(b)(4) (1982) (emphasis added). Similarly, the current statute bars *qui tam* suits based upon "public[ly] disclos[ed]" allegations "unless . . . the

ment has specifically objected that the statute would operate in derogation of the government's pre-existing substantive rights.

person *bringing the action* is an original source of the information" and "has voluntarily provided the information to the Government *before filing [the] action* . . . ." 31 U.S.C. § 3730(e)(4) (1988) (emphasis added). Because, under both versions, the applicability of the *qui tam* bar is "inextricably tied" to the date of the filing of the suit, "the most logical reading of the statute" is that, at a minimum, the new version should not be applied to suits filed before its enactment. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 838-39 (1990).

This analysis is elucidated and confirmed by this Court's decision in *Kaiser*. In that case, Congress had amended 28 U.S.C. § 1961, which sets forth the applicable post-judgment interest rate, *after* the district court's judgment in *Kaiser* was entered but before the interest was calculated and assessed. 494 U.S. at 829-32. Although the amended statute did not expressly state whether the new interest rate would apply in such circumstances, the Court noted that § 1961, "originally and as amended," provides that the "starting point" for the accrual of interest is "the date of the entry of judgment." *Id.* at 838. Because, "[u]nder both versions of § 1961, the calculation of interest is inextricably tied to the date of the entry of judgment," the Court held that "the most logical reading of the statute is that the interest rate for any particular judgment is to be determined as of the date of the judgment. . . ." *Id.* at 838-39. Similarly, the fact that, under both versions of § 3730, the applicability of the *qui tam* bar is "inextricably tied" to the date of the filing of the complaint strongly suggests that, at a minimum, the appropriate version of the *qui tam* bar is to be determined as of the date of that filing.

Congress' expectation that the amended § 3730 would apply only prospectively to suits filed after enactment is further reflected by the dramatically different incentive structure that the new statute creates. Before the 1986

amendments, a *qui tam* plaintiff would lose his or her cause of action by disclosing the allegations to the government prior to filing suit, *see, e.g., Pettis*, 577 F.2d at 669-73, but under the amended § 3730, a *qui tam* plaintiff who is an "original source" of publicly disclosed allegations cannot bring suit *unless* the allegations were voluntarily disclosed to the government prior to the filing of the suit. 31 U.S.C. § 3730(e)(4)(B). By *reversing* in many circumstances what a relator must do to bring a *qui tam* suit, the amended statute makes clear that it was not intended to govern suits filed before the date of enactment. *Cf. Kaiser*, 494 U.S. at 839-40 (Court's refusal to apply the amended § 1961 retroactively was supported by the fact that the amended interest rate would have changed the expectations upon which parties made "informed decisions about the cost and potential benefits of paying the judgment or seeking appeal").

Finally, Congress' intent that the amended § 3730 would apply only to suits filed after enactment is confirmed by the fact that the new statute contains several provisions (such as an under-seal filing requirement) that *cannot* be applied to a suit filed under the prior law. The Ninth Circuit rejected this argument in *Hyatt*, concluding that the *Landgraf* opinion *requires* a court to decide the question of retroactivity on a subsection-by-subsection basis. 80 F.3d at 1429-30. This conclusion, however, is based on a clear misreading of this Court's decision in that case.

Landgraf applied a section-by-section approach *only* because it found "no special reason to think that all the diverse provisions of the [Civil Rights] Act must be treated uniformly for such purposes." 511 U.S. at 280. The 1986 FCA amendments are quite different. As the government pointed out during the district court proceedings in *Hyatt, see Hyatt* E.R. 58-61, the various provisions of the amended § 3730 were the result of a carefully crafted compromise in which Congress simultaneously expanded *qui tam* rights while

placing important restrictions on the exercise of those rights; accordingly, those provisions simply are *not* severable from one another.[11] *Cf. United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 162-63 (1914) ("the limitations upon [a newly created] liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself"). Because the under-seal filing requirements cannot retroactively be complied with, *see Landgraf*, 511 U.S. at 275 n.29, it follows that no portion of § 3730 should be applied retrospectively. *See United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 316-17 (1908) ("[W]e see no reason for holding that this statute, of but one section, should be split up in its construction, and one portion of it made applicable to cases already existing and other portions applicable only to the future.");

---

[11] In *Hyatt*, the government explained the FCA amendments as follows:

> Subsection (b)(2) of section 3730 imposes new requirements that all *qui tam* actions "shall" be filed *in camera*, "shall" remain under seal for a period of at least 60 days, and "shall not" be served upon the defendant until the court so orders. 31 U.S.C.A. § 3730(b)(2) (1987 pocket part). . . .
>
> The legislative history indicates that this section was the subject of much concern, and that the final provisions adopted were the product of compromise between a perceived need to expand the *qui tam* rights and a fear that these provisions could be abused if left unchecked. *See generally* S. Rep. No. 345, 99th Cong., 2d Sess. 14, 16, and 24-25 (1986); *Cong. Rec.* S15036 (daily ed. October 3, 1986); *Cong. Rec.* H9388-9389 (daily ed. October 7, 1986). The protective provisions of subsection (b)(2), section 3730, were inserted to protect the government and the defendant. "The Committee feels that sealing the initial private civil false claims complaint protects *both the government and the defendant's interests* without harming those of the private relator." S. Rep. No. 345, 99th Cong., 2d Sess. 24 (1986) (emphasis added).

Hyatt E.R. 58-59.

see also United States v. Fernandez-Toledo, 749 F.2d 703, 705 (11th Cir. 1985).

For all of these reasons, it is plain that, at a minimum, the amended § 3730 should not be applied to cases filed before the enactment of that statute. Accordingly, even if this Court determines that the amended statute may be retroactively applied in the instant case (which was filed *after* enactment of the FCA amendments), it should make clear that a contrary conclusion would be required in cases filed before enactment.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Dated: November 27, 1996

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No. 95-1340

IN THE

Supreme Court of the United States

October Term, 1996

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief *Amicus Curiae* of Taxpayers Against Fraud, The False Claims Act Legal Center in Support of Respondent.

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INTEREST OF *AMICUS CURIAE*

Taxpayers Against Fraud, The False Claims Act Legal Center (TAF) is a nonprofit public interest organization dedicated to combating fraud against the Federal Government through use of the *qui tam* provisions of the federal False Claims Act (FCA or Act). TAF's mission is both activist and educational. Established in 1986, TAF serves to: 1) collect and evaluate evidence of fraud against the Federal Government and facilitate the filing of meritorious False Claims Act *qui tam* suits; 2) work in partnership with *qui tam* plaintiffs, private attorneys, and the Government to prosecute *qui tam* suits effectively; and 3) inform and educate the public about the Act and its *qui tam* provisions.

As part of its educational outreach, TAF collects and disseminates information concerning the False Claims Act and *qui tam*. For example, TAF publishes the *False Claims Act and Qui Tam Quarterly Review* (TAF QR) which provides an overview of case decisions, recoveries, and other developments. TAF also maintains a comprehensive FCA library and an educational presence on the Global Internet.

Over the last decade, TAF has supported numerous FCA cases that have collectively returned hundreds of millions of dollars to the United States Treasury. The funds TAF recovers from successful cases are continually reinvested to develop and support future *qui tam* actions and to fund TAF's educational activities. TAF possesses extensive knowledge about the origin and purposes of the False Claims Act Amendments of 1986 and experience with the amended FCA's implementation.[1]

SUMMARY OF ARGUMENT

Congress passed the 1986 FCA Amendments in response to pervasive fraud against the Federal Government and several identified weaknesses of the Government's anti-fraud efforts.

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[1] Counsel for all parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.

These weaknesses included the lack of detection of fraud, insufficiency of government enforcement efforts, and inadequacy of government resources. Congress envisioned that *qui tam* relators could substantially contribute to anti-fraud efforts by exposing and bringing forward evidence of fraud, activating and advancing cases to prosecution, and providing financial and human resources. Accordingly, Congress' primary aim in amending the Act was to bolster anti-fraud efforts by encouraging more private enforcement suits.

The amended FCA allows any person to bring suit, limited only by four specific restrictions, including the restriction relevant here -- 31 U.S.C. § 3730(e)(4) (1994). For § 3730(e)(4) to be triggered, its precise wording requires that every element be satisfied, including that there has been a "public disclosure." The plain and ordinary meaning of "public" and "disclosure," in the context of the statute as a whole and its purposes, requires that for a "public disclosure" to occur there must be an affirmative act of exposure to the people as a whole.

The proper determination of whether a "public disclosure" has occurred involves an objective analysis of both the means of disclosure and the audience that has received the disclosure. The first part of the inquiry examines whether the means by which a disclosure was made rendered it likely that it would reach the people as a whole. In the converse, to the extent there were restrictions on access, the disclosure could not possibly be considered "public." The second part of the inquiry examines whether the actual audience to which the disclosure was made constitutes the general public; or, conversely, whether the audience received the information only in some special capacity. In the case at bar, the audits were never disseminated in a manner designed to reach the people as a whole. Moreover, the contractors only received the audits because of their business relationship with the Government. Thus, the Ninth Circuit correctly held that no "public disclosure" occurred in this case.

Petitioner's interpretation of "public disclosure" is at odds with the plain language of the statute and essentially renders "public disclosure" superfluous. Moreover, Petitioner's

interpretation rests upon an unsupported and erroneous view of the Act and its history. The actual language of the statute and the actual language in the legislative history reveals Congress' intent to invite all citizens to join in the effort to expose and remedy fraud. Congress' only limits on its broad appeal are set forth in specific and concrete terms in the statute.

Petitioner's propositions regarding damages under the FCA are also baseless. Proof of damage to the public fisc is not an element of an FCA violation. This is apparent from the text of the statute, the legislative history, and this Court's prior decisions. Moreover, submission of claims for payment while knowingly violating an explicit cost accounting disclosure requirement can form the basis for FCA liability.

ARGUMENT

I. Background

A. Congress Designed the 1986 FCA Amendments in Response to Rampant, Unremedied Fraud Being Committed Against the Government.

The 1986 FCA Amendments were the legislative response to what Congress concluded was a "severe" problem -- that is, the "growing pervasiveness of fraud" in Federal programs and procurement. S. REP. NO. 345, 99th Cong., 1st Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266 (S. REP.).[2] Congress revitalized the False Claims Act's *qui tam* provisions because it believed that "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds." S. REP. at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5267. Its explicit intent was "to encourage

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[2] Congress cited with alarm U.S. Department of Justice (DOJ or Justice Department) estimates that fraud was draining up to 10 percent of the entire Federal budget. S. REP. at 3, *reprinted in* 1986 U.S.C.C.A.N. at 5268; *accord* H.R. REP. No. 660, 99th Cong., 2d Sess. 18 (1986) (H. REP.) ("Evidence of fraud in Government programs and procurement is on a steady rise.").

more private enforcement suits" under the Act. S. REP. at 23-24, *reprinted in* 1986 U.S.C.C.A.N. at 5288-89.

Congress' redesign of the FCA's *qui tam* provisions was aimed at addressing three general categories of weaknesses in the Government's ability to prosecute fraud effectively. First, Congress recognized that "most fraud goes undetected" due in part to the Government's "weak internal controls and the fact that government auditors do not pay adequate attention to possible fraud." H. REP. at 18; *accord* S. REP. at 2-3, *reprinted in* 1986 U.S.C.C.A.N. at 5287-88. Congress also emphasized that, among those who are aware of fraud, "there appears to be a great unwillingness to expose illegalities." S. REP. at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269.

Second, Congress determined that, even when evidence of fraud is detected, the Government takes action to recover taxpayer dollars lost to fraud "in only a small percentage of cases." S. Rep. at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5267. It expressed concern that "there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action." H. REP. at 22-23. Citing Justice Department data, the Senate Report concluded that "most fraud referrals remain unprosecuted and lost public funds, therefore, remain uncollected."[3] S. REP. at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269.

Congress considered the third weakness it identified -- lack of adequate resources -- as "perhaps the most serious problem plaguing effective enforcement." S. REP. at 7, *reprinted in* 1986 U.S.C.C.A.N. at 5272. It recognized that the Government, working alone, simply has insufficient resources to detect and prosecute the level of fraud being committed -- especially given the growth and diversification of federally funded programs that are targets of fraud. *Id.* As a

[3] According to the Senate Report, Justice Department statistics showed that in fiscal year 1985 the Civil Division received 2,734 fraud referrals, but filed only 36 complaints and obtained merely 54 settlements or judgments. S. REP. at 4 n.10, *reprinted in* 1986 U.S.C.C.A.N. at 5269 n.10.

result, law enforcement officials are "forced to make 'screening' decisions based on resource factors." *Id.* Further, Congress determined that, "Allegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient." *Id.*

Congress also concluded that, "An additional problem . . . exists when large, profitable corporations are the subject of a fraud investigation and able to devote many times the manpower and resources available to the Government." S. REP. at 8, *reprinted in* 1986 U.S.C.C.A.N. at 5273. The Senate Report stated that, "[I]n far too many instances the Government's enforcement team is overmatched by the legal teams major contractors retain." *Id.* Given budgetary constraints, Congress foresaw that the amount of government resources devoted to policing fraud would not substantially increase. S. REP. at 7, *reprinted in* 1986 U.S.C.C.A.N. at 5272.

Congress viewed the increased involvement of private citizens through *qui tam* suits as vital to addressing each of the problems it identified. As such, it described its "overall intent" in amending the *qui tam* provisions as "to encourage more private enforcement suits." S. REP. at 23-24, *reprinted in* 1986 U.S.C.C.A.N. at 5288-89.

Congress envisioned that, using the revitalized *qui tam* provisions, private citizens could contribute to the anti-fraud effort in a variety of ways including: 1) bringing forward and exposing evidence of fraud,[4] 2) activating and advancing

[4] S. REP. at 25, *reprinted in* 1986 U.S.C.C.A.N. at 5290 ("[I]n many cases, individuals knowing of fraud are unwilling to make disclosures in light of potential personal and financial risk as well as a lack of confidence in the Government's ability to remedy the problem."); H. REP. at 23 ("The purpose of the *qui tam* provisions of the False Claims Act is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward.").

cases to prosecution,[5] and 3) providing financial and human resources.[6] Congress believed that giving *qui tam* relators a more direct role in the litigation would also serve as "a check" to ensure that "the Government does not neglect evidence, cause . . . [undue] delay, or drop the false claims case without legitimate reason." S. REP. at 26, *reprinted in* 1986 U.S.C.C.A.N. at 5291.

B. The 1986 Amendments Carefully Balance Government Prosecutorial Prerogatives and Incentives for *Qui Tam* Relators.

The 1986 FCA Amendments revised the *qui tam* provisions in several respects. Most notably, Congress created a structure for *qui tam* relators to actively participate in the litigation, added ranges of financial awards for successful relators, and removed restrictions on *qui tam* actions where the Government already possessed evidence or information regarding the alleged fraud.

Under the amended *qui tam* provisions, a relator initiates an FCA suit by filing a complaint under seal. The relator also provides the Government a copy of the complaint and a written disclosure of substantially all material evidence and information in his possession. 31 U.S.C. § 3730(b)(2) (1994). The Government then has sixty days to investigate the allegations and decide whether to intervene and assume

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[5] H. REP. at 22-23 ("[T]he Committee is concerned that there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action."); S. REP. at 24, *reprinted in* 1986 U.S.C.C.A.N. at 5289 ("[M]uch of the purpose of *qui tam* actions would be defeated unless the private individual is able to advance the case to litigation.").

[6] S. REP. at 8, *reprinted in* 1986 U.S.C.C.A.N. at 5273 (injecting private resources into the fraud enforcement effort can even out the current mismatch of human and financial resources between the Government and corporate targets); S. REP. at 26, *reprinted in* 1986 U.S.C.C.A.N. at 5291 ("[T]he often heavy, sporadic workload of Government attorneys may create a situation where a *qui tam* plaintiff is better able to conduct the litigation in a timely manner.").

primary responsibility for prosecuting the action. *Id.* However, the Government can (and usually does) move to extend the time period for keeping the action under seal and making its intervention decision. 31 U.S.C. § 3730(b)(3) (1994).[7]

Congress designed the Act to permit the relator to participate in the litigation while reserving substantial control for the Government. For instance, in those cases where the Government initially declines to intervene, the Government may intervene in the suit at a later date upon a showing of good cause. 31 U.S.C. § 3730(c)(3) (1994). When the Government does intervene, the relator continues as a party to the action, but the Government has the "primary responsibility for prosecuting the action" and is not bound by any act of the relator. 31 U.S.C. § 3730(c)(1) (1994). The Government and the defendant may ask the court to restrict the relator's participation in the action for various reasons. 31 U.S.C. § 3730(c)(2)(C) - (D) (1994); *see also* 31 U.S.C. § 3730(c)(4) (1994) (Government may petition the court to stay a relator's discovery). And the Government may settle the action over the objections of the relator, provided the relator is given an opportunity for a hearing, and provided that the settlement is "fair, adequate, and reasonable." 31 U.S.C. § 3730(c)(2)(B) (1994).

As these provisions indicate, Congress constructed the Act to allow the Government to choose among a variety of different options, using its limited resources where it deems most efficient. For instance, the Government can preserve its resources by choosing to intervene in the *qui tam* actions most likely to lead to substantial recoveries, leaving smaller dollar cases, or those with substantial litigation risk, for *qui tam* relators to develop and pursue on their own. Moreover, to protect its interests, "The Government may dismiss the action

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[7] Where there is a related criminal investigation or proceeding, the *qui tam* action is normally kept under seal or stayed pending conclusion of the criminal action. Petitioner's suggestion to the contrary is misleading; moreover, it is irrelevant to the statutory construction issues before this Court and instead part of Petitioner's policy argument against the concept of *qui tam* itself that is woven throughout Petitioner's brief.

notwithstanding the objections of the [relator] . . . ." 31 U.S.C. § 3730(c)(2)(A) (1994) (§ 3730(c)(2)(A)).

Congress also recognized that relators' contributions will vary greatly and, as a result, established multiple ranges of monetary awards for differing levels of contribution. For example, relators who obtain recoveries without the Government's intervention are eligible for the highest range of recovery -- 25 to 30 percent of the proceeds. *See* 31 U.S.C. § 3730(d)(2) (1994). Other relators are eligible to receive 15 to 25 percent, "depending upon the extent to which the person substantially contributed to the prosecution of the action." 31 U.S.C. § 3730(d)(1) (1994). However, relators whose actions are based primarily on certain "disclosures," including non-public disclosures (*infra*, section II.B.), may receive only up to 10 percent, and could receive no award. *Id.* The percentage award for this latter class of relators is dependent in part on whether the relator contributed by "advancing the case to litigation." *Id.*

Also of significance is what Congress did not include in its 1986 amendments. Congress did not create any affirmative test for relators to satisfy in order to gain standing to file an action. Instead, the Act simply states that, "A person may bring a civil action for a violation of section 3729 for the person and for the United States Government." 31 U.S.C. § 3730(b) (1994) (§ 3730(b)). The wide authorization of private suits granted by § 3730(b) reflects Congress' stated goal of encouraging "*any* individual knowing of Government fraud to bring that information forward." S. REP. at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5267 (emphasis added).

The invitation for anyone to act as a relator is limited only by the four specific restrictions listed at 31 U.S.C. § 3730(e) (1994). The restriction relevant to the instant case, § 3730(e)(4)(A), reads as follows:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation,

> or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

As discussed in section II, *infra*, with this language Congress used concrete and specific terms to describe certain conditions under which an action would be foreclosed.

C. The Effect of the *Qui Tam* Amendments.

In October of 1996, the amended *qui tam* provisions of the FCA marked ten years of existence. Congress believed that allowing and encouraging assistance from private citizens "can make a significant impact on bolstering the Government's fraud enforcement effort." S. REP. at 8, *reprinted in* 1986 U.S.C.C.A.N. at 5273. Indeed, since the amendments were enacted, at least $1.455 billion has been recovered due to relators' initiatives under the Act's *qui tam* provisions.[8]

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[8] As of July 23, 1996, DOJ reported *qui tam* recoveries of approximately $1.13 billion. Letter from Frank W. Hunger, Assistant Attorney General, Civil Division, Justice Department, to the Honorable Charles E. Grassley 2 (July 23, 1996) (Appendix at A1) (Hunger letter). Since then, settlements from just four *qui tam* cases have produced an additional $325 million in recoveries. Press Releases of the Justice Department entitled "Major Clinical Laboratory To Pay $187 Million To Resolve Charges Of Making False Claims To Government Programs -- Third Largest Health Care Fraud Recovery" (Nov. 21, 1996), "Damon Clinical Laboratory Agrees To Pay $119 Million To Resolve Charges Of Making False Claims To Government Programs" (Oct. 9, 1996), "FMC Corp. Agrees To Pay $13 Million To Settle False Claims Act Allegations" (Oct. 8, 1996), and "Two National Clinical Laboratories: Corning And Unilab Pay $11 Million To Federal Government To Settle False Medicare And Other Federally-Funded Insurance Programs Claims" (Sept. 19, 1996) (These materials have been lodged with the Clerk of the Court.). Without any government assistance, *qui tam* relators in 39 cases have recovered approximately $26 million. Hunger letter at 2. While many of the cases declined by DOJ are dismissed -- often voluntarily by the relator without any litigation -- a conservative calculation, based on the statistics currently available, of the average recovery from *all qui tam* actions is approximately $2 million per case ($1.455 billion total recoveries from 481 declined plus 39 resolved cases plus 208 cases in

Other data further show that the amended Act is living up to Congress' goal of enhancing the Government's ability to recover losses sustained by fraud. While originally used primarily against false claims submitted by defense contractors, the Act has recovered hundreds of millions of dollars illegally diverted from health care for the elderly, the poor, and government employees, from social services programs for children, from government-sponsored scientific research grants, from transportation safety initiatives, from housing and urban development programs, and from other crucial federal expenditures. TAXPAYERS AGAINST FRAUD, THE FALSE CLAIMS ACT LEGAL CENTER, THE 1986 FALSE CLAIMS ACT AMENDMENTS TENTH ANNIVERSARY REPORT 18-24, 34 (1996).[9]

Besides being applied to a variety of Government programs, the Act has been used to prosecute a broad variety of illegal activity. The Act has recovered funds fraudulently obtained from the Government by double billing, product substitution, unnecessary services or services not performed, cost shifting, false testing, noncompliance with statutes, regulations, or contract terms, inadequate quality of care, kickbacks, and the like.

The Act's successes have been acknowledged and acclaimed by public servants from different government branches and different political parties. The Vice President wrote on the occasion of the amended Act's tenth anniversary:

> [T]he "*qui tam*" provisions of this law have recovered $1.3 billion of the American people's money. By revitalizing the original 1863 "False Claims Act", Americans now possess the tools needed to help us stop fraud and abuse of many government programs. Certainly, this represents the kind of public-spirited

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which DOJ joined). The actual average is probably higher in that, of the 208 cases DOJ has joined, many are still pending and will likely produce additional substantial recoveries.

[9] This material has been lodged with the Clerk of the Court.

> participation in government that needs to be encouraged and applauded.

Letter from Vice President Al Gore to Taxpayers Against Fraud, The False Claims Act Legal Center (Sept. 27, 1996), *reprinted in* 7 TAF QR 24 (Oct. 1996).[10] The Attorney General at the time the amendments were passed, Edwin Meese III, also celebrated the law's ten years of existence:

> It is a pleasure for me to join you in marking the tenth anniversary of the enactment of the False Claims Act Amendments of 1986, which was signed into law by President Ronald Reagan. . . . Because of this statute, private citizens have provided information and filed lawsuits on behalf of the federal government to recover taxpayer funds from those engaged in fraud and abuse of the people's money. This law has strengthened the incentives and protections for those individuals who have served their country in this manner, and has thus been an excellent example of privatization in the public interest.

Letter from Edwin Meese III to Taxpayers Against Fraud, The False Claims Act Legal Center (Aug. 15, 1996), *reprinted in id.* at 25.

The Justice Department also commended the value of the amended *qui tam* provisions. The Assistant Attorney General of the Civil Division, Frank Hunger, noted that the *qui tam* provisions are "[o]bviously . . . working very well" and further stated:

> The recovery of over $1 billion demonstrates that the public-private partnership encouraged by the statute works and is an effective tool in our continuing fight against fraudulent use of public funds. . . . This is a remarkable achievement for the taxpayers of this country.

Press Release of the Justice Department entitled "Justice Department Recovers Over $1 Billion In Qui Tam Awards And Settlements" 2 (Oct. 18, 1995).

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[10] This material has been lodged with the Clerk of the Court.

This praise for *qui tam* is justified not only by available statistics regarding recoveries and breadth of application, but also by the findings of an economic study recently completed.[11] According to the analysis contained in that study, *qui tam* recoveries under the FCA can be expected to equal between about $6.9 billion and $9.3 billion over the next ten years. Further, deterrence of fraud due to the Act's *qui tam* provisions can be expected to range between $105.1 billion and $210.1 billion over the period 1996 to 2006.

II. The Meaning of "Public Disclosure" Under § 3730(e)(4)(A) Is Determined by Its Plain Language Read in Context with the Statute As a Whole and Its Purposes.[12]

This case raises the issue of how "public disclosure" under § 3730(e)(4)(A) should be interpreted. As this Court has ruled, the starting point for interpreting a statute is the words of the statute itself. *Bailey v. United States*, 116 S. Ct. 501, 506 (1995). "Public disclosure" is not defined in the FCA. However, "[w]hen terms used in a statute are undefined, we give them their ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 115 S. Ct. 788, 793 (1995).

A. The Ordinary Meaning of "Public Disclosure" Is An Affirmative Act of Exposure to the People As a Whole.

Section 3730(e)(4)(A) bars actions "based upon the public disclosure of allegations . . . ." Thus, "public" is used as an adjective to modify or describe a type of "disclosure."

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[11] William L. Stringer, THE 1986 FALSE CLAIMS ACT AMENDMENTS: AN ASSESSMENT OF ECONOMIC IMPACT (Sept. 1996) (An Economic Study Commissioned By Taxpayers Against Fraud, The False Claims Act Legal Center). This material has been lodged with the Clerk of the Court.

[12] TAF adopts Respondent's position on retroactivity and offers this analysis in the event that the Court finds that § 3730(e)(4), as amended, applies to this case.

"Public," in its adjectival form, is defined as "of, relating to, or affecting the people as an organized community,"[13] and "relating to, or affecting the whole body of people or an entire community."[14] It is further defined as "[o]pen to all,"[15] "exposed to general view,"[16] and "[g]enerally known (public knowledge)."[17]

"Disclose" means "to open up," "to expose to view," "to make known,"[18] and "[t]o bring into view by uncovering; to expose; to make known."[19] "Disclosure" is, of course, the "[a]ct of disclosing."[20]

"Public" is commonly used as a modifier to describe

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[13] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1836 (3d ed. 1976) (WEBSTER'S).

[14] BLACK'S LAW DICTIONARY 1227 (6th ed. 1990) (BLACK'S). Several other dictionaries similarly define "public" as relating to the community as a whole; for instance, "[o]f or pertaining to the people as a whole; that belongs to, affects, or concerns the community or nation; common, national, popular," THE OXFORD ENGLISH DICTIONARY 778 (2d ed. 1989); "of, relating to, or affecting all the people or the whole area of a nation or state," MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 944 (10th ed. 1995); "[o]f, concerning, or affecting the community or the people," THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1464 (3d ed. 1992).

[15] BLACK'S at 1227.

[16] WEBSTER'S at 1836.

[17] WEST'S LEGAL THESAURUS/DICTIONARY 618 (1985). Other synonyms for "public" include, "Notorious, well-known, manifest, patent, acknowledged, visible, exposed, plain, overt, evident, published, publicized." *Id.*

[18] WEBSTER'S at 645.

[19] BLACK'S at 417.

[20] *Id.*

places and objects that are open and available for use by all (e.g., public library, public park, public telephone). However, when used to modify an act such as a disclosure, e.g., "public announcement," "public statement," or "public airing," the term takes on a more precise meaning. That is, a "public" announcement, statement, airing, or disclosure is one that is directed to the people as a whole, i.e., the general public. When any of those terms is used without "public" as a modifier, it could refer to an announcement, statement, airing, or disclosure that may or may not be directed to the general public. That is, one could make an announcement, statement, or disclosure in a private setting or to a select group of people. However, such acts would not be considered "public."[21] Clearly, a "public" announcement, statement, airing, or disclosure connotes exposure to the people as a whole.

In short, the ordinary meaning of "public" and "disclosure," when read together, requires an affirmative act which exposes a matter to the people as a whole.

B. Petitioner's Flawed Interpretation Renders the Statute's "Public Disclosure" Language Superfluous.

As this Court has recognized, we must assume that "Congress intended each of its terms to have meaning." *Bailey*, 116 S.Ct. at 506. Indeed, "'[j]udges should hesitate . . . to treat [as surplusage] statutory terms in any setting.'" *Id.* at 506-07 (quoting *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994)). Moreover, "[w]e assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning." *Id.* at 507.

The wording of § 3730(e)(4)(A) is precise. Broken out by its basic elements, the Act forecloses those actions that are:

1) "based upon"

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[21] For example, a political candidate could make a "public statement" or "public announcement" at a press conference. However, if that candidate made the same statement or announcement to only his campaign staff, then it would not be considered "public."

2) "the public disclosure"

3) "of allegations or transactions"

4) a) "in a criminal, civil, or administrative hearing,"
b) "in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or"
c) "from the news media,"
(collectively "enumerated means")

5) so long as neither the Attorney General nor an "original source" brought the action.

This statutory structure reveals that each of the various elements, including "public disclosure," has meaning and requires a separate and distinct inquiry. To understand the meaning of "public disclosure" it is useful to eliminate interpretations that are inconsistent with both the plain language and the structure of the statute. For example, the statute clearly does not read "based upon allegations or transactions . . ." or "based upon the disclosure of allegations or transactions . . ." or "based upon allegations or transactions . . . that are disclosed to a stranger to the fraud." Yet, the interpretations urged by Petitioner and supporting *amici* presume just that. In other words, to adopt their interpretations would require that "public disclosure," or at a minimum, the term "public," be read out of the statute altogether. Additionally, their interpretations require that the phrase "stranger to the fraud" or some equivalent be added to the statute.

While Petitioner concedes that an ordinary meaning for "public disclosure" is disclosure to the general public, Brief for Petitioner at 25 (Pet. Br.), Petitioner instead urges a definition that could not possibly fit within the phrase's plain meaning or the context of the statute. Petitioner defines "public disclosure" to mean a disclosure to any one person, so long as that person is a "stranger to the fraud." As the first step of its analysis, Petitioner appears to rely on the fact that the enumerated means listed at § 3730(e)(4)(A) (e.g., audits

and investigations) are not automatically disclosed to the general public. *Amicus* Lockheed Martin similarly emphasizes that the Government generally "does not publish its audit reports, mail them to reporters or other industry observers, place them in the Congressional Record, or file them in libraries or courthouses." Brief of Lockheed Martin Corp. as *Amicus Curiae* in Support of the Petitioner at 20 (Lockheed Martin Br.). From this observation, Petitioner leaps to a conclusion that "public disclosure" therefore must be limited to the narrowest manner in which the enumerated means could possibly be disseminated.

Petitioner misreads the statute so that the enumerated means swallow the phrase "public disclosure" and render it superfluous. That is, if the ordinary or narrowest level of dissemination for the enumerated means determines, defines, and limits the meaning of "public disclosure," there is no need for the "public" modifier -- nor indeed for the entire "public disclosure" phrase in the statute. Under Petitioner's definition, the statute would read "based upon the disclosure of allegations or transactions in (or from) [the enumerated means]" or even simpler "based upon allegations or transactions in (or from) [the enumerated means]."

Ironically, Petitioner's observations regarding the private and often narrowly disseminated nature of the enumerated means instead supports and explains why "public disclosure" is a necessary and meaningful modifier in the statute. That is, "public disclosure" is necessary to distinguish between those common instances in which allegations or transactions in audits, investigations, etc. *are not* exposed or disseminated to the general public and those instances when they *are*.[22]

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[22] Similarly, "public disclosure" is necessary to distinguish those "allegations or transactions" "from the news media" which are exposed to the general public versus those that are not. For example, a reporter conducting an investigation may unearth "allegations or transactions" of FCA misconduct and reveal those to sources he is interviewing. However, until those "allegations or transactions" are "publicly disclosed" (e.g., through publication or broadcast of a news story), the "public disclosure" element of § 3730(e)(4)(A) is not established.

Moreover, we need look no further than § 3730(d)(1) to see that the Act itself distinguishes between a "*public* disclosure" through the enumerated means and a mere "disclosure" through the enumerated means. That provision provides, in part:

> Where the action is one which the court finds to be based primarily on *disclosures* . . . relating to allegations or transactions in a criminal, civil, or administrative hearing . . . or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds . . . .

§ 3730(d)(1) (emphasis added).

Unlike § 3730(e)(4)(A), this section does not include the word "public," but it does list the exact same enumerated means through which a "public" disclosure may occur. Therefore, it is clearly recognized in the statutory language itself that allegations or transactions in or from the enumerated means can be disclosed either publicly or non-publicly. In short, "public" adds independent and substantive meaning in § 3730(e)(4)(A).

Petitioner's argument that "public disclosure" means disclosure to "some member of the public" also renders the statutory phrase meaningless. Because everyone is conceivably a "member of the public," a "public disclosure" would occur whenever "allegations or transactions" in one of the enumerated means were read, viewed, or heard by anyone. Adopting this definition would mean a "public disclosure" occurs when, for example, the person who prepares an administrative audit report shows it to his superior or provides it to the subject of the audit for review. Similarly, a "public disclosure" would occur when an investigator discusses a fraud investigation with his spouse or ten-year-old child.

Moreover, Petitioner fails to adhere to a consistent "member of the public" theory. Instead, it arbitrarily carves out certain members of the public -- "non-strangers to the fraud" -- to whom receipt of a disclosure would not trigger the bar. That is, according to Petitioner, "public" in

§ 3730(e)(4)(A) refers to "a member of the public who is a stranger to the fraud." Pet. Br. at 13. In addition to never defining "strangers to the fraud," Petitioner fails to explain how its "stranger to the fraud" concept is implicit or explicit in any definition of "public," or why a "non-stranger to the fraud" is not a member of the public.

It appears that the actual intent behind the tortured definitions posited by Petitioner and its *amici* is to persuade this Court to read out the term "public" to help turn § 3730(e)(4)(A) into "a quick trigger" that will require virtually all relators to prove they qualify under the "original source" exception. In other words, they aim to make the exception the rule. However, Congress did not include a disclaimer -- either in the statutory language or legislative history -- that subsection (A) is not to be taken seriously.[23]

C. The Purposes of the 1986 Amendments Support Defining "Public Disclosure" As Exposure to the People As a Whole.

The public disclosure bar at § 3730(e)(4) is embedded in a broader piece of legislation that substantially rewrote the *qui tam* provisions of the False Claims Act. As discussed above, the 1986 FCA Amendments were the congressional response to the "growing pervasiveness of fraud." S. REP. at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5266. To address this problem, Congress was explicit that its intent was "to encourage more private enforcement suits." S. REP. at 23-24, *reprinted in* 1986 U.S.C.C.A.N. at 5288-89. The legislative history is full of Congress' concerns about fraud draining the Treasury and its desire to appeal to the private sector to pitch

[23] Petitioner has apparently abandoned the argument in its Petition for *Certiorari* that documents are somehow "publicly disclosed" when potentially available under FOIA. Petition for *Certiorari* at 16-18, Supplemental Brief at 6. In any event, the Ninth Circuit's holding that the mere existence of documents potentially available to the public does not constitute a public "disclosure" under § 3730(e)(4)(A) is wholly correct. To hold otherwise would both ignore the plain meaning of the term "disclosure" and fly in the face of Congress' explicit elimination of the government possession of information bar.

in and help remedy the problem. In contrast, there is virtually no discussion in the legislative history pertaining to restrictions for certain types of suits or certain types of relators. Such restrictions were clearly not Congress' primary concern; i.e., Congress was searching for ways to encourage *qui tam* actions, not bar them.

Congress designed the revised *qui tam* provisions not only to summon private individuals to bring forward eyewitness evidence of fraud, but also to enlist the private sector in exposing fraud (however they may come upon it), advancing cases to prosecution, and providing financial and human resources to the litigation. S. REP. at 4, 7-8, 25-26, *reprinted in* 1986 U.S.C.C.A.N. at 5269, 5272-73, 5290-91. Congress recognized that some relators could potentially contribute to all of these purposes, while others would contribute less. To account for the varied levels of possible contributions by relators, Congress created ranges of financial awards. § 3730(d)(1)-(2).

For example, the statute clearly allows cases based primarily on non-public "disclosures" in audits, investigations, and other enumerated means. While in these cases the relators may not be contributing evidence of fraud that originated from their own first-hand knowledge, such relators may be able to contribute to the purposes of the statute by exposing the alleged fraud to the public, by activating a case, and by offering resources to prosecute the case. The size of the relator's award, however, will depend on what is actually contributed. And where a relator provides no contribution, the statute provides that the court may deny the relator an award altogether. § 3730(d)(1).

With § 3730(e)(4), Congress drew a line barring cases derived from certain "public" disclosures. These cases present a somewhat different scenario from cases that utilize information from *non*-public disclosures. That is, if the alleged fraud has already been exposed to the general public, a relator with no independent information is unlikely to be able to significantly advance the purpose of exposing and bringing forward evidence of fraud. Moreover, once evidence of fraud is disclosed to a widespread general audience (e.g., via a

televised investigative report or an open congressional hearing), it is more likely that pressure will be brought to bear on the Government to activate a case and less likely that the matter will slip through the cracks of the Government's law enforcement structure. On the other hand, when disclosures are confined to a select or restricted audience, chances increase that the matter may not receive adequate attention and wrongful conduct will remain unremedied.

D. Petitioner's Interpretation of "Public Disclosure" Rests Upon an Unsupported and Erroneous View of the FCA and Its History, and Is at Odds with the Purposes of the Statute.

Since Petitioner and its *amici* cannot rely on (and notably rarely cite to) the plain language of the statute to support their interpretation of "public disclosure," they instead devote much of their briefs to spinning out an unsupported and erroneous view of the False Claims Act and its history. Petitioner's interpretation of the Act ultimately hinges on its repeated assertion that the 1986 Congress aimed to preserve an alleged "traditional" "bedrock" distinction between "whistleblowers" and "parasites." It fails, however, to define what it means by "parasitic" versus "whistleblower" actions -- other than that the former should be prohibited and the latter should not. Further, neither Petitioner nor its *amici* can point to anywhere in the current or former versions of the Act where those terms are used, or even to any reference to "parasitic actions" in the committee reports accompanying the 1986 amendments.[24]

A complete and objective reading of the 1986 legislative materials belies Petitioner's rendition of history. In 1986, Congress pointed out that, under the original 1863 FCA, there were no restrictions on *qui tam* actions and an action could be instituted "as easily by a private individual, as by the Government's Representative." S. REP. at 10, *reprinted in*

[24] The only support (beyond its own repeated assertions) that Petitioner provides for its alleged "bedrock" "parasitic" theory is lower court case law dicta which do not cite to or rest on any language in the statute or legislative history.

1986 U.S.C.C.A.N. at 5275. The 1986 Congress further recognized this Court's upholding of the Act's lack of restrictions in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). S. REP. at 10-11, *reprinted in* 1986 U.S.C.C.A.N. at 5275-76. Far from expressing outrage at the *Marcus* case, the Senate Report highlighted the portion of Justice Black's decision in which he pointed out that, even if the relator had merely copied the Government's indictment, he "contributed much to accomplishing one of the purposes for which the Act was passed" by tripling the net recovery for the Treasury. S. REP. at 11, *reprinted in* 1986 U.S.C.C.A.N. at 5276.

While the 1986 Congress traced the 1943 legislative action that followed *Marcus*, it also noted that there was considerable debate at the time regarding the advisability of establishing restrictions against citizen suits. *Id.* It then criticized the breadth of the 1943 amendments, using egregious examples to illustrate the counterproductive effect of the 1943 government possession of information bar.[25] S. REP. at 12-13, *reprinted in* 1986 U.S.C.C.A.N. at 5277-78. Most significantly, the 1986 Congress did not express any

[25] While the 1986 Senate Report cited *United States ex rel. Lapin v. International Business Machines Corp.*, 490 F. Supp. 244 (D. Hi. 1980) (applying 1943 jurisdictional bar even if the Government makes no effort to investigate) and *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984) (using 1943 bar to dismiss state relator that had conducted investigation and given information to the Federal Government), nowhere does it indicate that Congress was seeking only to remedy the situations presented in these cases. S. REP. at 12-13, *reprinted in* 1986 U.S.C.C.A.N. at 5277-78. In fact, if Congress wanted to do only that, it could have achieved that result by tailoring an amendment to the government possession of information bar. For example, Congress could have simply added "investigation" to government possession and included an exception for relators who had originally supplied the fraud information to the Government. Instead, Congress crafted completely different language. The only conclusions the Senate and House Reports permit upon an objective reading are that Congress understood the 1943 bar, realized its deleterious ramifications for *qui tam* litigation, and wanted to create an entirely different system that would encourage and support *qui tam* actions.

particular concern regarding so-called "parasitic" actions.

In fact, to the extent Petitioner uses "parasitic" to refer to cases derived from secondary sources, Congress clearly decided not to exclude those actions wholesale, carving out at § 3730(e)(4) only limited and specific types of such cases that would be barred. As discussed *supra* at I.B., II.C., the plain language of the Act explicitly permits actions based on certain secondary sources. § 3730(d)(1). Congress' explicit response to such cases (which, as explained above, may have value, albeit perhaps diminished) was to cap the relator's award at 10 percent and introduce the possibility of no award at all if the relator ends up providing no value. Thus, contrary to Petitioner's assertions, adopting its tortured reading of § 3730(e)(4) is not necessary to prevent a so-called non-contributing "parasite" from receiving an undeserved "windfall" "by diverting money from the public fisc." Pet. Br. at 23, 37. The plain language of the statute (which Petitioner ignores) already provides more than adequate protection for the public fisc.[26]

Petitioner's and its *amici's* primary concern appears to be the non-meritorious *qui tam* action, which they attempt to incorporate under their "parasitic" label. But § 3730(e)(4) has nothing to do with judging whether a case presents evidence

[26] Similar award reductions would have been one way for the 1943 Congress to have dealt with its concerns regarding *Marcus*. Under the law that existed at the time of *Marcus*, the relator was guaranteed a 50% recovery regardless of where he obtained his information. However, the award structure established by Congress in 1986 -- under which the Government receives the bulk of the recovery from every *qui tam* suit -- made it prudent not to establish an overly broad bar of certain types of *qui tam* suits or relators. Under the amended Act, a relator who ends up contributing little or no value may receive little or no award under § 3730(d)(1). Even in those cases where the relator is in the 15-25% award category, the Government still retains 75-85% of the recovery. On the other hand, the Government may very well end up recovering nothing whenever a relator capable of bringing a successful case is barred. In short, the cost to the Treasury of an expansive bar on relators would be much greater than that of leaving the door open for relators who may provide minimal contribution.

of conduct that violates the Act. Rather, it sets forth a set of conditions under which a *qui tam* action -- regardless of its merits -- may not be brought. Congress has chosen to rely on the Federal Rules of Civil Procedure, supplemented by §§ 3730(d)(4) and 3730(c)(2)(A) of the Act, to deter and eliminate actions that are clearly without merit.[27] Petitioner nevertheless promotes its flawed and overly expansive interpretation of § 3730(e)(4) as a means to do so -- an interpretation which would also deter and eliminate even the most meritorious *qui tam* suits.

E. The Ninth Circuit Correctly Held that No "Public Disclosure" Occurred in this Case.

A proper determination of whether a "public disclosure" under § 3730(e)(4)(A) has occurred involves an objective analysis of both the means of disclosure and the audience receiving the disclosure. The first part of the inquiry examines whether the means by which a particular disclosure was made rendered it likely that it would reach the people as a whole. This would include looking at whether the means of disclosure contemplated dissemination to the general public and whether the disclosure was made equally available to all. In the converse, to the extent there were restrictions on access, the disclosure could not possibly be considered "public."

The second part of the inquiry examines whether the actual audience to whom the disclosure is made constitutes the general public; or, conversely, whether the audience received the information only in some special capacity. This inquiry would include looking at whether a disclosure was made to a select group that was given access to the information because of its status (e.g., disclosure made to a contractor's employees in the scope of their employment; disclosure made to a contractor because of its business relationship with the Government; disclosure made to a litigant solely because of its

[27] Under § 3730(d)(4), if a *qui tam* suit is clearly frivolous or brought primarily for harassment purposes, the defendant may be awarded its attorneys' fees and expenses. Under § 3730(c)(2)(A), the Government may dismiss a non-meritorious case notwithstanding the objections of the relator.

status as a party).

The Ninth Circuit was correct in holding that, where contractor employees were provided access to a government audit, no "public disclosure" occurred. Clearly, the means of disclosure in that instance (i.e., the Government simply supplied an audit to Petitioner and Northrop pursuant to its contractual relationship with the companies) neither contemplated nor resulted in disclosure to the people as a whole. On the contrary, the Government simply made private disclosures to certain of its contractors -- not to the public. Moreover, because there were restrictions on access to the audits, these disclosures certainly cannot be considered "public."[28]

Similarly, the actual audience to whom the audit was disclosed was not the general public, but a select and limited group. Here, the contractor employees received the audit in their capacity as employees and solely because of their employer's business relationship with the Government.

F. If this Court Agrees with Petitioner and Finds There Was a "Public Disclosure," the Court Needs to Clarify to the Ninth Circuit That "Based Upon" Means "Derived From."

If this Court reverses the Ninth Circuit and agrees with Petitioner that the mere divulgence of a government audit to company employees is a "public disclosure" within the

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[28] DCAA Audit Report No. 4511-7B486004 (Oct. 16, 1986) (Jt. App. at 33-38) and DCAA Audit Report No. 4511-7B486004SI (June 2, 1987) (Jt. App. at 39-42) are marked "FOR OFFICIAL USE ONLY" on the bottom of each page. Further, the first pages of each report warn that, "Contractor information contained in this audit report may be confidential. The restrictions of 18 U.S.C. § 1905 should be considered before this information is released to the public." *See also* Supplemental Affidavit of John F. Wilson in Support of Defendant's Motion for Summary Judgment F.R.C.P. 56(b) (Jt. App. at 113-15) and Declaration of Laurie L. Bilbruck (Jt. App. at 116-17) (affirming that the Air Force Audit at issue in this case was classified "SECRET" during the relevant period).

meaning of § 3730(e)(4)(A), then whether Respondent's suit was actually "based upon" the public disclosure, and, if so, whether he qualifies as an "original source" will need to be addressed by the Ninth Circuit. Ninth Circuit case law, however, appears to essentially read "based upon" out of § 3730(e)(4)(A); moreover, it adds an illegitimate extra-textual requirement to the explicit definition of "original source" at § 3730(e)(4)(B).

As the Fourth Circuit persuasively found in *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir.), *cert. denied*, 115 S. Ct. 316 (1994), "based upon" in § 3730(e)(4)(A) is "susceptible to a straightforward textual exegesis." *Siller*, 21 F.3d at 1348. The Fourth Circuit explained, "To 'base upon' means to 'use as a basis for.' Rather plainly, therefore, a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based." *Id.* (citation omitted).[29]

To the extent that Congress intended to bar a certain group of so-called "parasitic" actions, it addressed the "parasitic" concept through the "based upon" language of § 3730(e)(4)(A). Thus, should the Court adopt Petitioner's view of "public disclosure," the Court should make clear that only those actions that are actually "derived from" public disclosures are barred. It is particularly important to clarify the meaning of "based upon" in this case given that the Ninth Circuit, without squarely facing the issue, has strongly suggested that the § 3730(e)(4)(A) bar automatically applies once a public disclosure has occurred, regardless of how the relator obtained his information. *See United States ex rel.*

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[29] *United States ex rel. LeBlanc v. Raytheon Co.*, 62 F.3d 1411 (1st Cir. 1995) (affirming the district court's opinion adopting *Siller* definition of "based upon" as "derived from"). Certain other circuits have either ignored the "based upon" requirement or found that it merely means "supported by" regardless of whether the relator actually derived his knowledge from the public disclosure. *See United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548 (10th Cir. 1992); *Cooper v. Blue Cross and Blue Shield of Fla., Inc.*, 19 F.3d 562, 567 (11th Cir. 1994).

Devlin v. State of Cal., 84 F.3d 358, 360 (9th Cir.), *cert. denied*, 117 S. Ct. 361 (1996); *Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992).

Additionally, the Ninth Circuit has grossly erred in its interpretation of the "original source" exception to the § 3730(e)(4)(A) bar, dramatically and arbitrarily narrowing who can qualify as an "original source." Ignoring the clearly expressed statutory definition of "original source" at § 3730(e)(4)(B), the Ninth Circuit imposes an extra-textual requirement that a relator "'must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which the suit is based.'" *Wang*, 975 F.2d at 1418 (*quoting United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990)). This requirement simply does not exist anywhere in the language of § 3730(e)(4)(B).[30] Moreover, contrary to the clear intent of Congress, this interpretation of "original source," along with Petitioner's erroneous view of "public disclosure" and a definition of "based upon" that differs from "derived from," would constrict *qui tam* actions significantly beyond the pre-1986 government knowledge bar.[31]

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[30] The Fourth and Eleventh Circuits have thoroughly criticized and rejected the Ninth Circuit's extra-textual requirement. *Siller*, 21 F.3d at 1351-55; *Cooper*, 19 F.3d at 568 n. 13. This Court should likewise follow its own precedent and reject the imposition of an additional requirement that appears nowhere in the statute. *See Smith v. United States*, 113 S. Ct. 2050, 2054 (1993).

[31] For example, under these theories, where "allegations or transactions" of fraud are revealed in the morass of civil discovery in litigation between two private parties, any subsequent *qui tam* action to remedy that fraud, even if brought by the most knowledgeable insider who did not see the discovery, would be barred. While ignored by Petitioner, it should be noted that courts have not limited the enumerated means to only those disclosures made by the Government or the media. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1158 n.5 (3d Cir. 1991) ("We also reject summarily the law firm's contention that subsection (e)(4)(A) addresses only those public disclosures made by the government."); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir.), *cert. denied*, 508 U.S. 973 (1993) (holding that information produced in discovery in civil suit between two private litigants was publicly disclosed.).

The courts below have not made any factual determinations whether Respondent's action was actually "based upon" any of the alleged public disclosures or, if so, whether Respondent is an "original source." Thus, a remand with instructions setting forth the proper meaning of "based upon" and "original source" is warranted should this Court reverse the Ninth Circuit's "public disclosure" holding.

III. Petitioner's Propositions Regarding Damage Requirements Under the FCA Are Baseless.[32]

Petitioner's *cert.* petition asks, "Whether injury to the public fisc is an essential element of a cause of action under the FCA." Petitioner's brief changes the question to, "Whether the FCA imposes liability for alleged infractions of other statutes or regulations regardless of whether such infractions result in a 'false claim' against the public fisc." These are two different questions. Each will be considered separately.

A. Proof of Damage to the Public Fisc Is Not an Element of an FCA Violation.

The text of the statute, the legislative history, and this Court's prior opinions make clear that proof of damage to the public fisc is not a prerequisite to FCA liability.

The language of the statute is perfectly clear -- a cause of action under the Act does *not* include the requirement that the public fisc be damaged. Section 3729(a) lists seven ways the

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[32] TAF briefs this issue in the event that the Court's ruling on retroactivity requires its consideration.

Act may be violated[33]. The seven violations are phrased so that even an *unsuccessful* attempt to commit one of them gives rise to liability. If an unsuccessful attempt gives rise to liability, damage to the public fisc is clearly not a prerequisite to an FCA violation.[34] Further, the structure of the statute also reflects this fact. Only after the seven violations are enumerated and the statute provides that they cause liability does the Act address damages.

Congress considered this a significant enough issue to address in its legislative history. It made it clear that damage to the public fisc is not a prerequisite to FCA liability: "The United States is entitled to recover . . . forfeitures solely upon proof that false claims were made, without proof of any damages. . . . A forfeiture may be recovered from one who submits a false claim though no payments were made on the claim." S. REP. at 8, *reprinted in* 1986 U.S.C.C.A.N. 5273 (citation omitted).[35] The Senate Report further made clear

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[33] For example, 31 U.S.C. § 3729(a)(1) and (2) (1994) state: "Any person who -- (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; . . . is liable to the Untied States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . ."

[34] This crafting of the statute is consistent with Congress' overall purpose of clamping down on widespread fraud against the Government.

[35] Elsewhere the Report stated that, "The cost of fraud cannot always be measured in dollars and cents, however. . . . Even in the cases where there is no dollar loss -- for example where a defense contractor certifies an untested part for quality yet there are no apparent defects -- the integrity of quality requirements in procurement programs is seriously undermined. A more dangerous scenario exists where in the above example the part *is* defective and causes not only a serious threat to human life, but also to national security." S. REP. at 3, *reprinted in* 1986 U.S.C.C.A.N. at 5268 (emphasis in original).

that, "The Supreme Court's opinion in *United States v. Neifert-White Co.*, 390 U.S. 228 (1968), indicated that the False Claims Act, 'was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.' The Committee strongly endorses this interpretation of the act . . . ." S. REP. at 19, *reprinted in* 1986 U.S.C.C.A.N. at 5284.

A line of this Court's cases over fifty years old is consistent with the statute's text and history. In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), the Government discovered fraud on several projects before making any payments. When this Court reviewed that case, it affirmed the district court's holding that failure to show actual damage at trial does not preclude recovery under the Act. The Court cited this conclusion with approval in *Rex Trailer Co. v. United States*, 350 U.S. 148, 152-53 n.5 (1956).

The Court's decision in *Neifert-White*, about ten years later, reiterated that the Government need not prove damages to establish FCA liability. It stated that, "[T]he False Claims Act should not be given the narrow reading that respondent urges. This remedial statute reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." 390 U.S. at 233, cited with approval in S. REP. at 19, *reprinted in* 1986 U.S.C.C.A.N. at 5284. The Court's choice of the word "attempts" shows that unsuccessful efforts to get the Government to pay a false or fraudulent claim also violate the Act.

Thus, there is neither statutory, legislative, nor Supreme Court support for Petitioner's suggestion that a violation of the FCA requires proof of damage to the public fisc.

B. When a Regulation Is a Requirement of a Federal Contract or Program, Knowing Failure to Comply with It Incurs FCA Liability.

Petitioner's restatement of its question presented for *certiorari* seems simply to present a truism -- a violation of the

False Claims Act requires a false claim. This Court does not need to spend any time on such a non-issue. Lurking behind Petitioner's restated question, however, may be another issue -- can a violation of a statute or regulation trigger FCA liability? The law's legislative history addressed this question straight on. In responding affirmatively to the question, it stated, "The False Claims Act is intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services. Accordingly, a false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation." S. REP. at 9, *reprinted in* 1986 U.S.C.C.A.N. at 5274; *accord* H. REP. at 21 ("[A] false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of a contract term, a statute, or a regulation.").

Petitioner would have this Court rule that a violation of the FCA, whether or not triggered by statutory or regulatory noncompliance, requires that the Government be overcharged. Such a ruling, however, would not comport with the statute's text or legislative history. Indeed, the legislative history pointed out clearly that the conduct prohibited by the Act is much broader and more sophisticated than just overcharges. It stated that, "[C]laims may be false even though . . . services are provided as claimed if, for example, the claimant is ineligible to participate in the program . . . ." S. REP. at 9, *reprinted in* 1986 U.S.C.C.A.N. at 5274.

In this case, Respondent has alleged that Petitioner violated the FCA by failing to disclose adequately its method of allocating costs between two contracts. Petitioner's compliance with this statutory disclosure requirement was an explicit contractual requirement. As such, "knowing" non-compliance with this requirement, even if in the end the Government was not overcharged, triggered FCA liability.

CONCLUSION

For these reasons, the opinion of the Ninth Circuit should be affirmed.

Respectfully submitted,

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January 3, 1997

January 3, 1997

APPENDIX

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

July 23, 1996

The Honorable Charles E. Grassley
Chairman, Subcommittee on Administrative
Oversight and the Courts
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Senator Grassley:

Thank you for your letter of June 21, 1996, concerning the ten-year anniversary of the qui tam amendments to the False Claims Act. The amendments can be credited with over a billion dollars in recoveries to the Treasury to date.

To respond to your specific questions, as a preliminary matter, you should be aware that many qui tam cases are handled by the United States Attorneys' offices throughout the country. Although we attempt to maintain current information, we have found in the past that it is necessary for us to contact each U.S. Attorney's office to ensure the accuracy of our data. The last time we performed such an update was the end of last year. We are in the process of

performing a new update, and when more current statistics are available, we will forward them to you.

Since the 1986 amendments to the qui tam statute, there have been 1386 qui tam case filed, as follows:

FY 87 - 33 cases
FY 88 - 60 cases
FY 89 - 95 cases
FY 90 - 82 cases
FY 91 - 90 cases
FY 92 - 119 cases
FY 93 - 131 cases
FY 94 - 221 cases
FY 95 - 278 cases
FY 96 - 277 cases (to date)

Our records show that, to date, the Department of Justice has chosen to pursue 208 of these cases. In the cases pursued by the United States, we have, from the 1986 amendment to date, obtained recoveries of about $1.13 billion.[1] Of this amount, the Department of Defense is the client agency as to 68% of the dollars, the Department of Health and Human Services is the client agency as to 26% of the dollars, and other agencies are the clients as to 6% of the dollars.

We have paid the qui tam plaintiffs who brought the lawsuits to us $196,515,473.60 as their statutory share in the cases we have pursued. This amount represents about 18% of the government's damages in cases where relator shares have

[1] In the same time period, the Department recovered an approximate additional $2.3 billion in non-qui tam fraud matters within the authority of the Commercial Litigation Branch. Our office does not track the number of complaints filed throughout the country in False Claims Act cases that are not qui tam cases. Some of the non-qui tam fraud recoveries were obtained after a complaint was filed, and some were obtained through pre-suit settlements.

been determined.[2] These shares have almost always been determined through mutual agreement between the United States and the qui tam plaintiffs.

Our records show that we have declined 723 qui tam cases. Qui tam plaintiffs have obtained recoveries in 39 of these cases. Of the remaining cases, 481 have been dismissed with no recovery, 29 are inactive, the status is unclear in 72 cases, and the qui tam plaintiffs are actively litigating 102 cases.

Total False Claims Act recoveries in cases that the Department has declined to pursue to date are about $26 million. In these cases, the qui tam plaintiffs have been paid a total of $7,026,217.50 as their statutory share, representing about 28.5% of the government's damages in cases where shares have been determined. In cases that the Department of Justice has declined to pursue, the qui tam plaintiffs or their attorneys have also recovered additional amounts for other causes of action, for costs, or for attorneys' fees, in which the United States Treasury has not shared. We know of an additional $24,426,798.55 in such payments in cases we have declined, but in many instances these amounts have not been reported to us, and so the amount actually recovered is larger by an unknown amount.

Our records show that 455 qui tam cases are still under investigation. We assume that our current survey will provide additional information with respect to some of the cases which we show in this category.

Of the qui tam cases still pending, about 38% involve the Department of Defense as the client agency, and about 40% involve the Department of Health and Human Services as the client agency.

The occasion of the anniversary gives me the opportunity to again congratulate you and Congressman Berman on the success your amendments have proven for the taxpayer.

[2] This includes cases where the share, under the statute, is to be between 0 and 10%, 31 U.S.C. § 3730 (d) (1).

Please do not hesitate to contact me if you need any additional information.

Respectfully yours,

/S/

Frank W. Hunger
Assistant Attorney General

cc: The Honorable Howard L. Berman
Committee on the Judiciary
U.S. House of Representatives

Supreme Court, U.S.
FILED
JAN 3 1997
CLERK

(20)

No. 95-1340

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE PROJECT ON GOVERNMENT OVERSIGHT IN SUPPORT OF RESPONDENT

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No. 95-1340

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE PROJECT ON GOVERNMENT OVERSIGHT IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

The Project on Government Oversight ("POGO") is a non-partisan non-profit organization that for over fifteen years has addressed -- by investigation, exposure, and formal written submissions -- waste and fraud in government spending. Its goal is to change the way the government works by revealing examples of systemic problems and offering possible solutions.

Originally named the Project on Military Procurement, the organization focused on military spending abuses. It

made outrageously overpriced spare parts, such as the $7,600 coffee maker and the $1,000 pair of pliers, household words. The organization also revealed serious inadequacies in weapons, such as the Bradley Fighting Vehicle and the Sgt. York DIVAD Air Defense Gun. In 1990, the organization changed its name and broadened its focus to include fraud and abuse in federal government spending.

In 1994-95, POGO became involved on the defense industry's unsuccessful efforts to water down the False Claims Act, which POGO considers a vital means to protect and reward whistleblowers and to return billions of dollars to the government. POGO exposed how often the defense contractors lobbying to weaken the False Claims Act had themselves paid heavily to resolve charges of fraud and abuse in their government contracting. POGO produced a survey from public records which revealed that from FY 1990 to FY 1993, over 90% of the lobbying contractors had themselves been found guilty, pled guilty or settled in civil cases for such conduct. During that time frame, these companies had paid over half a billion dollars in fines, penalties and settlements for such conduct. The appendix to this brief includes a special updated POGO study following the approach of the 1994-95 survey.

POGO's methods include formal submissions to the government forums considering important matters of government contracting. For example, earlier this year, it made a highly regarded submission to the House of Representatives regarding the Treasury's enormous losses due to shortfalls in royalty payments by oil producers. *See Valuation of Federal Oil -- Is the U.S. Getting the Royalties It is Owed?: Hearings Before the Subcomm. on Government Management, Information and Technology of the House Comm. on Government Reform and Oversight*, 104th Cong., 2d Sess. (June 17, 1996) (publication forthcoming).

POGO submits an amicus curiae brief focusing on the interaction of the False Claims Act with the statute establishing the Cost Accounting Standards disclosure system. The organization's above-described efforts frequently produce visible impact, resulting in savings to taxpayers, in the realm of measures, like the Cost Accounting Standards disclosure system, that should protect the Treasury at its points of vulnerability to cost-reimbursement contractors.

By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Court of Appeals correctly held that Hughes Aircraft Company could be found liable under the False Claims Act for violating the disclosure requirement of the Cost Accounting Standards ("CAS") statute. Hughes attempts to evade its conceded "noncompliance with accounting disclosure," Pet. Br. 38, by arguing that it somehow falls outside the reach of the False Claims Act ("FCA"). Hughes is wrong for the following reasons:

First, the False Claims Act clearly does not require any showing of financial or monetary damage to the Government. (It appears from its recharacterization of the question presented that Hughes has now conceded this point.)

Second, it is clear that, in any event, CAS disclosure violations create the potential for financial or monetary injury to the Government. Under such circumstances, there is no doubt that a knowing violation of the disclosure requirement is within the scope of the FCA. While Hughes attempts to pass the disclosure requirement off as "wholly technical," the CAS Act is explicit that timely and accurate disclosure is an important "condition of contracting." Section 719 of the Defense Production Act of 1950 ("CAS Act"), Pub. L. No. 91-

379, 84 Stat. 796 (1970), *codified at* 50 U.S.C. App. § 2168 (1976).[1]

Congress imposed disclosure as a "condition of contracting" in order to protect itself from the types of injury that can result when such disclosure is inaccurate, untimely or absent. For example, contractors who violate the CAS disclosure requirement can position themselves to "game the system" by waiting to take advantage of how certain costs and certain contracts eventually play out. Moreover, contractors who violate the CAS disclosure requirement may also cause the Government to expend additional audit resources. In this case Hughes' failure to submit an accurate disclosure statement added to the government auditors' burden to determine whether Hughes had properly allocated its costs in compliance with CAS.

Finally, there is no doubt that in this case the Government has always reserved the issue of CAS noncompliance and FCA liability, despite releasing withheld funds to Hughes.

Hughes' violation of the CAS disclosure requirement denied the Government what it bargained for and created both potential and actual injury to the Government. The FCA properly applies to Hughes' claims and the decision of the Court of Appeals should be affirmed.

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[1] From enactment in 1970, through the period of the events in question, Section 719 was codified at 50 U.S.C. App. § 2168 (1976). The statutory revival of the Cost Accounting Standards Board in a new form, by Pub. L. No. 100-679, §5(b), 102 Stat. 4063 (1988), caused Section 719 to be recodified to the present location at 41 U.S.C. §422 (1994). For simplicity, reference will be to the codified section during the period in question, e.g., " § 2168(h)."

ARGUMENT

I. BECAUSE CONGRESS MADE ACCOUNTING DISCLOSURE AN EXPRESS "CONDITION OF CONTRACTING" IN THE 1970 CAS ACT, HUGHES INJURED THE GOVERNMENT BY VIOLATING THAT CONDITION IN ITS CLAIMS ON THE TREASURY.

Hughes' CAS disclosure violation warrants summarizing at the outset. Cost-reimbursed contractors like Hughes bill their customer (for pertinent purposes, the Government)[2] for their tens of millions of dollars in "direct" labor costs (as distinct from "indirect" overhead). *See* John Cibinic, Jr. & Ralph C. Nash, Jr., *Cost-Reimbursement Contracting* 660, 668 (2d ed. 1993)(direct and indirect costs). Hughes 1979 CAS disclosure statement spoke, for its Engineering Division, only of billing those costs to the pertinent contract. Thus, for labor on the B-2, it would bill only the B-2 contract, not some other contract, and vice versa.[3] Then, without Hughes amending its CAS disclosure to show a totally different accounting practice, Hughes' actual practice from 1982 to 1984 about-faced. Hughes pooled millions in such costs and billed them by formula to different contracts, fifty percent to one, and fifty percent to another. J.A. 19,111; Pet. Br. 56a; Cibinic & Nash, at 681-84 (cost pools). Meanwhile, according to allegations that must be accepted as true in the procedural posture of this

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[2] Hughes was a subcontractor on the B-2 and other projects, but the CAS Act and related obligations apply to a subcontractor the same as to a prime contractor.

[3] "Prior to 1984 [Radar Systems Group] had three (3) separate Disclosure Statements; Group Office, Non-Manufacturing [i.e., Engineering] Division, and Manufacturing Division. . . . There was no provision for the allocation of *development* costs between contracts in the Non-Manufacturing Division Disclosure Statement." J.A. 110-11 (emphasis in original).

case, Hughes instructed its supervisor, the relator Schumer, not to discuss this, while Hughes kept the prime contractor, Northrop, in the dark. Hughes' million-dollar claims on the Treasury, submitted in fraudulent violation of the CAS disclosure statute, were false claims.

After nineteen months of CAS nondisclosure, Northrop awoke, called in the auditors, and, in subsequent years, the auditors criticized Hughes sharply and repeatedly for CAS disclosure noncompliance.[4] Schumer, an insider who refused to participate in Hughes' wrongdoing, now stands ready to prove the elements of False Claims Act liability. The unanimous panel of the Court of Appeals soundly concluded that Hughes' motion for summary judgment failed to demonstrate the absence of disputed issues of material fact regarding Schumer's FCA cause of action for the CAS disclosure violation. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Appreciating why Hughes' claims were false claims requires analyzing the error in Hughes' insistence that its CAS disclosure violation cannot possibly be the slightest bit injurious to the fisc. This requires analyzing the CAS statute requiring disclosure, since, as with any statutory issue, the proper place to start is the text of the statute itself, and the meaning the law attaches to that text. In 1970, Congress created the CAS system by section 103 of Pub. L. No. 91-379, codified at 50 U.S.C. App. § 2168 (1982).[5] The CAS Act established the CAS Board and directed it to "promulgate cost-accounting standards designed to achieve uniformity and consistency in the cost-accounting principles followed by defense contractors and subcontractors under federal contracts." 50 U.S.C. App. § 2168(g)(1982).

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[4] Hughes was "not in compliance with its disclosure statement." Pet App. 66a. The government noted Hughes' "RSG's noncompliance with its disclosure statement." Pet. App. 68a.

[5] The Government specifies that express condition by contractual clause as well as by public law.

That act's text brings us into the modern cost-accounting world, beyond the original 1863 False Claims Act's stories of cheating on simple goods like horses and horsefeed. Whereas the government makes acquisitions of well-defined goods and services by advertisement for sealed bids, it uses "negotiation" to make acquisitions too sophisticated for such precise specifications and simple price comparisons. Moreover, starting in World War II, and especially in the era of high technology weaponry epitomized by the aerospace research and development in this case, the government's defense contracting has relied heavily on cost-plus contracting. This method of contracting relieves the contractor of any risk by paying the contractor's costs, as reported pursuant to the contractor's cost-accounting practices, plus profit. Cibinic & Nash, *supra*, at 3-7 (historic background). Because the contractor's own accounting practices determine what gets claimed as "costs" for the Government to pay, it is critical that the Government know those practices in advance of contracting — just as the buyer in an international transaction must know in what currency the seller will require payment. If the seller could unilaterally switch currencies at a late date, the buyer would possibly find herself the loser, however legitimate the ultimate choice of currency.

Negotiated cost-reimbursement thus offers contractors a long-term arrangement with the goose that lays the golden eggs, namely, a guarantee from the Treasury for their cost claims. However, absent proper compliance by such contractors with the statutory requirements for, and, above all, the express conditions upon, those guaranteed cost claims, these contractors would have their hands on an uncontrolled spigot out of the Treasury. "Experience has shown 'cost-plus' contracts to be worse than worthless in the effort to prevent excessive costs." *Lichter v. United States*, 334 U.S. 742, 762 (1947). "The cost-plus-fixed-fee contract was used where unavoidable, but this form has the disadvantage . . . of imposing a heavy burden of auditing upon the Government . . . ." *Id.*

From World War II to the 1960s, Congress tried "renegotiation" as a method to protect the Treasury, *see id.*, without notable success; from the inadequacy of "renegotiation" arose the CAS Act.

The CAS Act does not confine contractor accounting practices to some uniform pattern. Rather, it lets contractors largely choose their own practices and still get guaranteed Treasury payment of costs plus profit -- conditioned upon disclosure. The CAS Act simply employs "the authority of Congress to impose, as a condition of doing business with the Government, a requirement that contractors disclose all of their cost" accounting practices, *Bowsher v. Merck & Co.*, 460 U.S. 824, 836 n.6 (1983) As the Act states:

> The [CAS] Board is authorized to make . . . regulations . . . . Such regulations *shall* require defense contractors and subcontractors as a *condition* of contracting to *disclose in writing their* cost-accounting principles . . . .

§ 2168(g)(1982)(emphasis added). The Congress that enacted the CAS Act recognized that cost-reimbursed contractors billing the Government by practices they thought quite acceptable took $2 billion more than Congress thought they should.[6]

Each phrase in the CAS text expresses an important point. At the outset, the disclosure section of the Act recognizes that contractors will still have "*their* cost-accounting principles," i.e., individualized practices not prescribed in standards. In other words, contractors will still have a wide variety of practices, just as before the Act, many of them acceptable so long as timely disclosed.[7] Congress added the

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[6] S. Rep. No. 890, 91st Cong., 2d Sess. (1970)("*Senate CAS Report*"), *reprinted in* 1970 U.S.C.C.A.N. 3770, 3772.

[7] For some contractors, "their" practice may be to bill costs to particular contracts (the technical term is "benefitting" contracts), and other contractors can pool and allocate by formula, a percentage to this contract, and a percentage to that one -- so long as all disclose early. This case exemplifies how Congress let contractors have "their" own cost-accounting practices on such matters. As far as the CAS Act left it, under Hughes' 1979 CAS disclosure statement, Congress let Hughes' Engineering Division follow its disclosed practice of billing direct labor costs to benefitted contracts, while, pursuant to that same statement, Hughes' Manufacturing Division could follow its practice of pooling the costs and then allocating by formula.

statutory direction to "*disclose in writing*" (what this brief refers to by the precise phrase "CAS disclosure compliance") exactly what "their" practices are.

"Disclose in writing" under the CAS act anticipates a formal system of disclosure, not whatever a contractor like Hughes might cite after its CAS disclosure noncompliance is discovered. This Act's text makes strikingly clear that Congress by public law — not by some fine-print procurement specification — expressly prescribed what Hughes failed to do: "disclose in writing." To "disclose in writing" forces contractors like Hughes to fix, firmly and visibly, at an early point in time and in a form ideal for use later in auditing, "their" practices. This disclosure is aimed at precluding an array of contract-negotiating and cost-reporting accounting maneuvers thereafter. That is, disclosure constrains these risk-free, profit-guaranteed Government contractors in their accounting maneuvers and techniques. Without timely disclosure, such contractors can submit (as the GAO warned in persuading Congress to enact the CAS disclosure condition) claims to the Treasury that obtain more than a risk-free, profit-guaranteed contractor should, while wasting the Government's thin-spread auditing resources.[8]

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[8] In 1968, by Act of Congress, the Comptroller General was directed to pave the way for what became the 1970 CAS Act. Congressional Quarterly, *1968 Almanac* 406 (1969). He did so through his crucial testimony at the hearings underlying the 1970 Act, *Extension of the Defense Production Act and Uniform Cost Accounting Standards: Hearings of the*

Moreover, by the statutory words "shall require," Congress made the CAS disclosure system an ineluctably ironclad mandate. The Defense Department, the Treasury, and the auditors were not the source of the requirement that Hughes violated. They could not have approved Hughes' noncompliance even if they wished. Congress' words "shall require" dictated otherwise. This section thus does not forbid merely the limited category of universally wrong accounting practices, e.g., such CAS-standard violations as bidding costs on one basis and charging on another, or charging private commercial contracts' costs to public contracts. Rather, and more importantly, the CAS Act requires that contractors like Hughes "shall" fix visibly and firmly "their" practices, even -- especially -- practices for tapping the till that might not otherwise be universally wrong.

"*[C]ondition* of contracting" is the most important phrase in the CAS disclosure provision. Congress codified that term of art of contract law, known as the most potent tool in the drafter's lexicon. The legislature dramatized how injured the Government is if these non-riskbearing contractors fail -- even inadvertently -- to "disclose in writing their cost-

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Subcomm. On Production and Stabilization of the Sen. Comm. On Banking and Currency, 91st Cong., 2d Sess. 171-72 (1970)(*"Senate CAS Hearings"*), and by his classic 1970 report, Comptroller General of the United States, *Report on the Feasibility of Applying Uniform Cost-Accounting Standards to Negotiated Defense Contracts* 114 (Jan. 1970) (B399995(1))("The principal features of any disclosure requirement might well be directed toward . . . preventing significant changes in contract costing without notice to, or approval of, the Government.")(reprinted as House Committee on Banking and Currency, 91st Cong., 2d Sess., *Report on the Feasibility of Applying Uniform Cost-Accounting Standards to Negotiated Defense Contracts* (Comm. Print 1970))(*"GAO CAS Report"*); *id.* at 118 ("We believe further that a solution to many of these problem areas could be achieved if the contractors were to disclose their underlying cost-accounting standards and techniques . . . .").

accounting principles."[9] Because the CAS Act uses the term "condition," this is an "express" condition. Moreover, in every CAS-covered contract, the contractor, like Hughes, agrees to that condition by the CAS contract clause echoing the Act.

Almost every contracts book teaches the "Distinction Between an Express Condition and a Promise," John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 11-9, at 445 (3d ed. 1987) (section heading), namely, "if B does not literally perform (and his performance is not excused), A will not be obliged to pay." *Id.* at 445. It does not matter whether by B's (Hughes') definition, or the definition of someone other than the Government, A (the Government) should be deemed well off without compliance with that particular express condition. The buyer demanded, as an express condition before payment, that condition and the seller agreed. Hence, the seller's right to payment is, literally, only conditional. The statute and the contract pronounce Hughes' violation of the condition (and its claim for payment despite the violation) as clearly injurious to the Government. Moreover, failure to fulfill an express condition invokes "the rule of strict compliance with an express condition," Calamari & Perillo at 448, especially in government contracting, in which the rule of strict compliance applies with particular vigor.[10]

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[9] Even the following of the uniform CAS standards is not a "condition of contracting," for Congress reserved that uniquely potent contract law term, "condition," with all its meaning about how much importance the Government places on this point, to the duty to "disclose in writing" their practices.

[10] *Radiation Technology, Inc. v. United States*, 177 Ct. Cl. 227, 366 F.2d 1003 (1966)(rule of strict compliance rule in government supply contracts); Donald P. Arnavas & William J. Ruberry, *Government Contract Guidebook* at 16-8 (1994) ("the Government is entitled to insist on strict compliance"); *cf. Internatio-Rotterdam, Inc. v. River Brand Rice Mills, Inc.*, 259 F.2d 137 (2d Cir. 1958)(strict compliance with express conditions in private contracts), *cert.denied*, 358 U.S. 946 (1959); *Jacob*

Turning to the False Claims Act, Hughes concedes, as it must, that this Court's precedents make a contractor's claim, like Hughes', a false claim even without proof of the government's "specific damages." Pet. Br. at 42 (quoting *Rex Trailer Co. v. United States*, 350 U.S. 148, 152-53 (1956)). As Hughes says, "[p]roof of specific damages is unnecessary to establish liability under the FCA . . . ." *Id.* Absent any requirement of specific damages, Hughes devotes this portion of its argument to creating an FCA requirement that Hughes calls the "injury" requirement.

The remaining sections of this brief will address the error of Hughes, focusing on the CAS perspective, that the fraudulent noncompliance with CAS disclosure by Hughes "could not have resulted in any improper request for payment," *id.*, that is, could not have rendered Hughes claims "false claims." At the outset, it warrants noting how closely Hughes' contention matches a contractor argument about CAS disclosure soundly rejected for over twenty years. In the earliest days of CAS, cost-reimbursement contractors like Hughes tried without success to restrict government remedies for CAS disclosure violations to some lightweight "sole remedy."[11] The CAS Board from its earliest days of implementing the Act confirmed that by making the clause about disclosure in writing a "condition of contracting," Congress prescribed "that breach of any of the requirements of this clause would be a breach of a *material condition* of the contract." 37 Fed. Reg.

& Youngs v. Kent, 230 N.Y. 239, 129 N.E. 889 (1921)(Cardozo, J.) (excuse from strict compliance possible for implied but not express conditions).

[11] When the CAS Board promulgated the disclosure form and the accompanying regulations, it noted the comments of contractors:

> Many commentators urged that the requirement to repay increased costs to the United States should be deemed the sole remedy for a refusal or failure to comply with the requirements of the contract clause.

37 Fed. Reg. 4139, 4142 (1972).

4139, 4142 (1972)(emphasis supplied).[12] The audit manual and the commentators emphasize that it is a "condition."[13] Hence, the commentary warns of liability under the "False Claims Act" for "[a] contractor that knowingly or wilfully falsifies or conceals a material fact in the Disclosure Statement." Lane K. Anderson, *Accounting for Government Contracts: Cost Accounting Standards*, §6.05, at 6-30 (1996).

Hughes' contention that its fraudulent cost-reimbursement submissions cannot become "improper request[s] for payment," Pet. Br. at 42, by CAS disclosure violation, is nothing new. Rather, it is merely the version in the cost-reimbursement context of the meritless argument in other contexts that the Government has no basis to complain of a false claim, even when the contractor fraudulently deprived the Government of what it conditioned its contract upon, when the contractor gave it a substituted product "as good." Something has to set the standard against which to measure a false claim: either the contractor's rationalizations in retrospect, or, beforehand, the public law and the con-

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[12] The Board answered the argument just quoted:

> In view of the fact that breach of any of the requirements of this clause would be a breach of a material *condition of the contract*, the default clause generally applicable to performance of the contract provides adequate coverage.

Id. (emphasis added). The default clause, 48 C.F.R. 52.249-8 (1996), has as subsection (a)(3) that "The Government may . . . terminate this contract in whole or in part if the Contractor fails to — (iii) Perform any of the other provisions of this contract . . . ."

[13] *E.g.* Defense Contract Audit Agency, *DCAA Contract Audit Manual* sec. 8-104.1, at 808 (1996)("*DCAAM*")("condition"); Cibinic & Nash at 633 ("condition"); Arnavas & Ruberry at 5-20 ("condition"); Lane K. Anderson, *Accounting for Government Contracts: Cost Accounting Standards*, 6-2 (1996) ("condition"); Gene Perry Bond & Tara Harvey, *The Cost Accounting Standards: Compliance Disputes and Proposed CAS Transfer Legislation*, 13 Pub. Cont. L.J. 211, 214 (1983)("condition").

tract conditions. The courts have always chosen the latter.[14] When a fraudulent contractor faces a false claims suit, the test of whether the contractor deprived the Government of what it bargained for, derives from the statute and contract that define the Government's conditions, not from Hughes' post-hoc mitigation notions. This is not broadening the FCA; this is simply applying the language of the FCA and the courts' settled FCA precedents to the context of the CAS disclosure statute.

II. CONGRESS'S 1970 STATUTORY CONDITION PROTECTS THE FISC AGAINST ACCOUNTING NONDISCLOSURE LIKE HUGHES', APART FROM WHETHER THE PRACTICES THEMSELVES WOULD OTHERWISE BE ACCEPTABLE; CONTRACTORS FRAUDULENTLY VIOLATING THAT CONDITION MAKE FALSE CLAIMS.

A. The 1970 Condition Protects the Fisc From the Possibilities for Contractors Like Hughes in Accounting Nondisclosure, Apart from Whether the Practices Themselves Would Be Otherwise Acceptable.

Hughes admits noncompliant accounting practices can support FCA liability, but argues that "the court [of appeals] erred by holding that noncompliance with accounting *disclosure*" can invoke the same FCA liability as a violation in "the underlying accounting practices." Pet. Br. 13. Cost-reimbursement contractors' claims can be false claims by fraudulence in disclosure as much as by fraudulence in practices. Hughes makes false claims when its violations impose

[14] *See, e.g., United States v. Aerodex, Inc.*, 469 F.2d 1003, 1007 (5th Cir. 1972); *United States v. National Wholesalers*, 236 F.2d 944 (9th Cir. 1956), *cert. denied*, 353 U.S. 930 (1957).

loss or exposure to loss upon the Government in various ways discussed in this section and the next. The words and purpose of the CAS statutory disclosure condition belie Hughes' notion that Congress' goal was only to oppose unacceptable accounting practices such as double billing or misallocation of pooled costs to the wrong ("unbenefitted") contracts.

Rather, Congress' goal concerned timely disclosure of *all* practices, even those that would be otherwise acceptable. Congress expected the CAS Act to restrain cost-reimbursement contractors in "the selection of differing but generally accepted cost accounting methods," which "can produce a variance of at least 5 percent in estimating the cost of a contract . . . [sometimes] much larger." *Senate CAS Report* at 3770. CAS disclosure would end the situation that "Contractors are free to pick and choose the cost accounting method most advantageous to them." *Id.* at 3771. The GAO's report concluded, under the heading "*NEED FOR DISCLOSURE*" (capitalization and emphasis in original): "Underlying many of the cost-accounting problems we observed is a need for a written agreement [[15]] of cost-accounting practices to be followed by the contractor." *GAO CAS Report* at 19. Comptroller General Elmer Staats testified: "Properly administered cost-accounting standards, together with a written disclosure by the contractor of his cost-accounting practices, could do much to promote a common understanding as to the methods

[15] In context, it is plain that what the Comptroller General called an "agreement" is what statutorily became the CAS condition to "disclose in writing" and in practice became the CAS disclosure form, prepared by the contractor but, absent intentional concealment on areas of dispute, subject to resolution of disagreement and hence of becoming like an "agreement." *See GAO CAS Report* at 131 (GAO questionnaire about "using advance agreements on accounting standards"), 268 (response: "This is simply good business. An agreement in advance should prevent numerous questions arising later and should save time for both the contractor and the Government.").

of cost determination to be used consistently." *Senate CAS Hearings* at 11.

At this stage, it is taken for purposes of whether the defendant can obtain dismissal that Hughes submitted its noncompliant CAS disclosure violation knowingly rather than having it occur inadvertently. Hughes raises only the issue of what it calls "injury," not what the record reveals about Hughes' motives. The record has prominent indicators that Hughes saw possibilities to advantage itself by its nondisclosure. After all, in 1982, Hughes did not follow the procedure in the CAS act available for resolving a legitimate contractor question about CAS disclosure: "a dispute under the contract dispute clause." Sec. § 2158(h)(1)(1982). Hughes could have, but did not, formally present the position in 1982 that on some legitimate basis it questioned whether its practice had to be CAS-disclosed. The company did not follow that procedure in 1982, in 1983, nor in 1984. In 1984, as discovery of its practice loomed, Hughes made no defense of any supposed or possible legitimate right not to make a CAS disclosure. Rather, nineteen months late, it made a CAS disclosure amendment. The amendment itself, in the circumstances, was tantamount to an admission of the violation. Additionally, "in 1983 [William J. Schumer's] supervisor . . . instructed him not to inform the contractors," Pet. App. 4a, of the accounting practice. Moreover, as the Court of Appeals dissects precisely, Hughes kept Northrop in the dark; that is why Northrop called in the auditors. Pet. App. 19a-20a (discussing Northrop's 1986 "white paper" that said Hughes' practice was "unilaterally implemented with no customer participation").

The fact that Hughes did not present, as a legitimate dispute, its decision to engage for nineteen months in CAS nondisclosure, coupled with its concealment instruction to Schumer and its proceeding without Northrop's participation, more than creates the issue of fact on remand about Hughes' knowing noncompliance. Rather, Hughes' knowing with-

holding of CAS disclosure underscores the possibilities for advantaging itself.

Hughes' position has been, until pinned down formally, that it could freely "elect" whether to charge its costs wholly to one contract, or to charge part to one, or to charge part to another,[16] a position consistent with Hughes' defense of its accounting practice, but quite at odds with the CAS disclosure condition. This joins the other record evidence about how Hughes used the nineteen months it obtained improperly by CAS nondisclosure to make use of delaying its supposed right of "election." At one point "[t]he B-2 program would have borne all costs," J.A. 136; at another, "the McDonnell Douglas (F-15) subcontract was proposed, evaluated, and negotiated as a stand alone effort," J.A. 31, meaning the F-15 program would "stand alone" bearing all its costs.

Fraudulent delay about informing of the Government and prime contractors, particularly about a practice that would let Hughes "elect" who and what to charge, gives the cost-reimbursement contractor undue power vis-à-vis the Treasury. What injures the Government is fraudulently depriving it of what CAS disclosure establishes, the firm and visible fixing of the practices. Hughes' route to enrichment is as simple as any other game in which a player discloses to others its power to "elect" the placement of its accounting bets nineteen months after the last proper moment to do so — even apart from the propriety of the placement of those bets if timely-

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[16] "Since the dual CPU was required for the B-2, Hughes could have *elected* to charge the costs associated with that effort entirely to the B-2 cost reimbursement type subcontract." Defendant's Fact No. 107, at 185, in Def. Rep. to Pl. Oppo. to Statement of Uncontroverted Facts and Conclusions of Law in Support of Motion for Summary Judgment, March 2, 1992, Docket No. 226. J.A. 9 (emphasis supplied).

made. For example, Hughes obtains an invaluable advantage in negotiating by fraudulently delaying that disclosure.[17]

More generally, the Court of Appeals noted that Hughes' "noncompliance with the CAS may have rendered the costs unallowable under 48 C.F.R. § 31.202-2(a)(3) which requires that `standards promulgated by the CAS' be considered in determining allowability of costs. *Id.*" Pet. App. 25a. Bribes and kickbacks to interfering officeholders might get the job done faster and might be, in cost-accounting parlance, readily "allocable" to the particular ("benefitted") expedited project, but though the contractor might deliver a product satisfying contract specifications — and such costs would meet some criteria of allowability — such costs do not meet all the criteria of allowability and their submission by a contractor like Hughes would support an FCA case.[18] Hence, auditors looking at one set of noncompliance issues may deem contractors' accounting to have, on some criteria, "saved the government money," App. 4a, without those auditors themselves, let alone the Court of Appeals or any other court, considering the contractor to have established the claimed costs' allowability by the other criteria, such as by what Congress makes an express

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[17] A contractor like Hughes can negotiate a high price on a contract like the F-15 by having an unamended old 1979 CAS disclosure statement that accords with its stance (the "stand alone" stance) that Hughes' F-15 contract, as a benefitted contract, bears full pertinent costs. Hughes' claim of a supposed power to "elect" what share of pooled costs the F-15 will bear becomes clear in CAS disclosure terms only when Hughes ends its noncompliance and announces pooling after nineteen long months. Hughes' advantaging traces much more to the lengthy disclosure violation than to the practice itself.

[18] *See, e.g., United States v. Acme Process Equipment Co.*, 385 U.S. 138, 144-48 (1966); *FMC Corp. v. United States*, 853 F.2d 882, 886 (Fed. Cir. 1988)(holding legal fees unallowable on one particular CAS allocability issue, though they may well meet other criteria for allowability and may even be payable out of another contract).

condition, that is, the CAS disclosure condition.[19] The Government does not endow cost-reimbursed contractors with a Midas touch to turn anything in their hands into Treasury payments, while picking and choosing with impunity which conditions of contracting the contractor will adhere to. In fact, the Court of Appeals properly cited the law known as the "Allowable Cost Reform Act," that expressly links different tests of allowability and the FCA.[20] The Court of Appeals also properly discussed the tie between adequacy of disclosure to Northrop and the criteria of allowability. Pet. App. 15a n.2 & 19a.[21]

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[19] Hughes seems to imply the CAS system allows contractors to buy off, or to pay off, the government for a CAS noncompliance by savings or payments some other way. As could be expected from the strong wording of the CAS Act, this is anathema. CAS noncompliance adjudication started with this ringing affirmation, in "[t]he first decision handed down by a board of contract appeals involving cost accounting standards," Paul M. Trueger, *Accounting Guide for Government Contracts* 252 (9th ed. 1988): "We emphatically disagree with appellant's assertion that a contractor has a right to refuse to comply with Cost Accounting Standards" by compensating the Treasury; "[a] motorist acquires no right to park his automobile on the sidewalk by continuing to pay the fines prescribed for so doing." *AiResearch Manufacturing Co.*, ASBCA No. 20998, 76-2 BCAS 12,150 (1976). "Under the Cost Accounting Standards clause, the contractor undertakes an affirmative obligation, inter alia, to comply with all Cost Accounting Standards in effect," *id.*; *accord*, Trueger, *supra*, at 252.

[20] In that statute, Congress made clear that such FCA liability could ensue for costs "specified by statute or regulation as being unallowable," Pet. App. 15a, apart from whether they pass muster by some other criterion such as the one Hughes trumpets. The Court of Appeals rightly cited this "Allowable Cost Reform Act." Trueger, *supra*, at 506 ("Allowable Cost Reform Act"); Cibinic & Nash, *supra*, at 1146. The Allowable Cost Reform Act is cited just as another indicator of how seriously Congress takes the FCA as a remedy for allowability criteria, not as applying to Hughes claims in this case.

[21] Hughes concedes its issue about the timing of presentation of issues to the district court does "not [relate] to [Schumer's] challenge to the ade-

B. The CAS Act's Disclosure "Condition of Contracting" Protects Another Fiscal Interest: Effectiveness of Audits.

As even Hughes admits, the gravamen of a "false claim" is the Government's exposure to a possible loss of a financial or fiscal nature. See Pet. Br. at 39 ("financial loss"), 40 ("pecuniary or property loss"), 43 ("injury to the public fisc"). For example, in the classic FCA cases of product substitution or attempted bilking, the gravamen is the Government's loss or exposure from the contractor's false claim, including the Government's effort to prevent or minimize loss. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). The contractor who fraudulently substitutes other types of parts in a plane than the ones the Government purchased need not have opportunities to advantage itself to be making a false claim. It suffices that the Government suffers loss, such as the dissipation of inspection effort.

The CAS statute protects, and Hughes' violation impaired, a vital Government interest in the struggle against fiscal exposure and loss: protecting the Treasury by making audits effective. This Court said in the cost-reimbursement context, "The cost-plus-fixed-fee contract was used where unavoidable, but this form has the disadvantage . . . of imposing a heavy burden of auditing upon the Government . . . ." *Lichter v. United States*, 334 U.S. 742, 762 (1947). The authoritative Comptroller General report underlying the CAS act, previously cited, drew upon the extensive painful failure of auditing in connection with the Renegotiation Board and related efforts. Contractors who were not required to make prior disclosure of their accounting practices dissipated the government's limited auditing resources. The Comptroller

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quacy of Hughes' disclosure to *Northrop*, *see id.* at 19a-22a." Pet. Br. 45 n.18. Because Hughes appears to have had one unified nondisclosure, the discussion in this brief would apply regardless of any such distinction attempted by Hughes.

General in his testimony and his report persuasively stated the way to salvage the government's fisc-protecting resources from a "myriad of controversies."[22] That is, Congress must condition contracting upon disclosure in writing by contractors like Hughes of their accounting practices. Otherwise, dissipation of government auditing resources could result even from undisclosed practices said to be acceptable and even good for the Government. "Contractors should be required to maintain records of contract performance costs in conformity with cost-accounting standards and any approved practices set forth in a disclosure statement . . . ." *Senate CAS Hearings* at 14 (testimony of Comptroller General). Absent this, "[m]eaningful audits of negotiated contracts by the Government agencies and GAO are thus rendered more difficult." *Id.* at 12.[23] Others explained why contract auditing and administration were almost hopeless without the tools, like disclosure, in the CAS Act.[24]

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[22] Distilled from a review of scores of case studies of contract controversies of auditing and litigation, a GAO summary concluded:

> [I]t is widely recognized - and past experience indicates - that the "submerged" portion of the problem is very substantial and sizable. For each problem that reaches the [Armed Services Board of Contract Appeals] or the courts, there are, partly because of the time and expense involved in resolution by judicial or quasi-judicial bodies, *myriad of controversies* which are settled based on one party persuading the other or through negotiating. . . . [H]owever, these settlements lack continuing commitment.

Senate CAS Hearings at 171-72 (emphasis supplied)(reproducing GAO report segment).

[23] Mr. Staats endorsed the bill that became the CAS Act because "Written disclosures would do much toward achieving consistency between the cost-accounting support for the price proposal and accumulation of subsequent cost information on contract performance cost." *Id.* at 15.

[24] The legendary Vice Admiral Hyman G. Rickover, architect of the nuclear submarine program, explained:

Hughes' case fits what the GAO meant by the injurious controversy-generating nature of undisclosed contractor accounting practices. In 1984, the prime contractor, Northrop, seeing its costs escalate unexpectedly, "requested a government audit of Hughes' accounting practices," Pet. App. 3a, before Hughes ended its nineteen-month fraudulent nondisclosure period and filed its July 1984 amendment of its CAS disclosure form. Hughes' failure to disclose thereafter drew down substantial government auditing resources. The Air Force Audit Agency completed the first audit in June 1986; subsequent Defense Contract Audit Agency ("DCAA") audits and related technical reviews from 1986 to 1988 concluded, as the Court of Appeals noted, that Hughes' practices "had not been reflected properly in accounting disclosure statements. As a result, the government withheld payment to Hughes of approximately 15.4 million in costs charged to the B-2 program." Pet. App. 3a.[25] What the DCAA sharply criticized was one of the prime categories of CAS disclosure noncompliance prominently addressed in the DCAA's manual and the commentary.[26]

As a result, the Air Force requested another DCAA review in September 1990, reminding "that the contractor was

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> We negotiate every day with the cards stacked against us. Defense companies are able to hire large numbers of experienced, highly skilled lawyers and accountants; these are faced by a very few, relatively inexperienced people in government who must look after the government's interests.

Id. at 498, 500.

[25] This suspension occurred December 10, 1987. A June 1990 Air Force letter reaffirmed that Hughes had not made an adequate CAS disclosure. (Pl. Sep. Statement of Material Fact, re Fact No. 90, at 155-, J.A.8.)

[26] *DCAAM* at 8-302.2.2(8), at 815 ("**Types of Noncompliance** . . . . (8) Actual practices of accumulating or reporting costs not in compliance with Disclosure Statement.")(bold in original); Cibinic & Nash at 1063 (quoting from earlier *DCAAM*).

in conflict with their disclosed accounting practices . . . ." J.A. 110. After several more DCAA efforts, in October 1991, Hughes filed a formal claim for the suspended $15.4 million, starting the formal dispute clause process under the Contract Disputes Act. J.A. 174. Hughes could, and presumably would, have appealed an adverse determination to the Armed Services Board of Contract Appeals.[27]

This long sequence of Government audits and claims controversy is precisely what the CAS Act disclosure "condition of contracting" intended to prevent. It would fly in the face of the False Claims Act for Hughes to argue that it can fiscally injure the Government without FCA liability so long as Government's loss occurs without corresponding gains going into the pocket of Hughes itself. Rather, Hughes argues that using the False Claims Act to enforce the Cost Accounting Standards condition is not "[c]onfining the FCA to its proper realm" of protecting the Treasury but rather is using the FCA "to enforce the statutory and regulatory rights of the United States across the board," such as for "'Nuclear Waste Policy.'" Pet. Br. at 41 & n.24 (quotation omitted). Perhaps cost-reimbursement contractors feel they have such a vested property interest in their potential claims on the Treasury that audits strike them as a fiscally irrelevant "regulatory right[] of the United States." The picture Hughes would seemingly draw is that Senator Proxmire, the fiercely Treasury-guarding chief sponsor of the CAS bill,[28] established the accounting disclosure condition, not in the FCA's "realm" of protecting the Treasury from government contracts, but for some policy goal of the general "statutory and regulatory rights of the United States" far from where the money is. This

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[27] *See generally General Motors Corp. v. Aspin*, 24 F.3d 1376, 13769, 1382-83 (Fed. Cir. 1994)

[28] For Senator Proxmire's role, see *Senate CAS Report* at 2. For the significance of sponsors, *see* Charles Tiefer, *Congressional Practice and Procedure* 240-42 (1989).

Court, well acquainted with Senator Proxmire's "Golden Fleece Award" of the CAS Act era (see *Hutchinson v. Proxmire*, 443 U.S. 111 (1979)), need not read his CAS Act as a fiscally-uninterested, Treasury-unrelated effort at regulation for general societal betterment.

III. HUGHES ERRS THAT THERE IS NO FALSE CLAIM FROM ITS SO-CALLED "WHOLLY TECHNICAL" VIOLATION, WHEN THE NINETEEN-MONTH DURATION, SERIOUSNESS, AND LARGE SCALE OF HUGHES' CAS NONDISCLOSURE SHOW IT TO BE PARTICULARLY INJURIOUS.

As shown by the Project on Government Oversight survey of public records in this brief's appendix, contractors like Hughes and amici have had plenty of reason to seek legislative watering-down of the False Claims Act, from past experience with the remedies for fraud and abuse in government contracting. The amici represent two industries: the health care industry which has paid over a billion dollars since 1994, and the defense industry which has paid over eight hundred million dollars since 1994, in FCA judgments and settlements and related matters.[29] Although Congress has made adjustments of the CAS system, these do not include what Hughes

[29] In January 1995, amicus curiae published a revised update of a 1994 special study. Project on Government Oversight, *Survey of Defense Contractor Signatories of the "Position Paper: Reform of the Federal Civil False Claims Act": A Partial Listing of the Fines and Settlements Paid for Fraud, Waste and Abuse in Government Contracting* (1995). The study surveyed 22 defense contractors, including Hughes, who were signatories of a submission to Congress entitled "Reform of the Federal Civil False Claims Act Position Paper." Neither the 103d nor the 104th Congress made the changes in the False Claims Act sought by those signatories. The report in the appendix follows the methodology of that 1995 study.

and amici seek in this case.[30] There is little need to dwell on the centrality for False Claims Act purposes of Hughes' certification that its disclosure statement was "complete and accurate," J.A. 17, or the countless clear warnings that such certification must be kept current and that when its practices changed in 1982-84, it must amend.[31]

Predictably, Hughes downplays the injurious characteristics of its CAS disclosure noncompliance as "wholly technical," and tries analogizing its case to *United States v. Data Translation*, Inc., 984 F.2d 1256, 1261 (1st Cir. 1992)(Breyer, J.)(in which "no reasonable person . . . could have believed that the Government really wanted," *id.* at 1261, the disclosure alleged in the suit to be required). However, Hughes committed a violation long in duration, serious in effect, and large in scale. Addressing duration first, the Court of Appeals accurately stated of Hughes' fraud that "for the period from December 1982 to [the Hughes CAS amendment for the period ending in] 1984" -- a CAS amendment filed in July 1984, J.A. 111 -- "Hughes violated the CAS by failing to state accurately in its disclosure statement its practice . . . ." Pet. App. 25a.[32] This was a nineteen month period.[33]

[30] In the Federal Acquisition Reform Act ("FARA"), enacted as Division D of Title VIII of the 1996 Defense Authorization Act, Pub. L. No. 104-106, section 4205 exempted commercial item contracts from cost accounting standards. The research and development contracts of Hughes in this case could not be further from commercial items.

[31] *See, e.g.*, American Institute of Certified Public Accountants, *Audits of Federal Government Contractors : Audit and Accounting Guide* 2.40 at 25 (1994 ed.) ("The CAS contract clause . . . . requires amending the disclosure statement for any change in practices . . . ."); Trueger at 245-46 (section on "Amending of Disclosure Statements").

[32] Hughes definitized its subcontract on October 24, 1982, Pet. App. 42a, an act necessitating a formal avowal upon the DD-633 for the accepted proposal, J.A. 154, 200. "VI. COST ACCOUNTING STANDARDS BOARD (CASB) DATA (PUBLIC LAW 91 379 AS

The Department of Defense CAS Working Group promulgated a time standard in 1977 with the title that explains what was to be distinguished: "*Deliberate Noncompliance and Inadvertent Noncompliance*." Department of Defense CAS Working Group, Working Group Item 77-12 (Mar. 29, 1977)("*Deliberate Noncompliance*"), in *Cost Accounting Standards Guide (CCH)* para. 5990.12, at 6482 (1992). As a rough guide, when a contractor's commencement of practice, and disclosure, respect a sixty day line, the Working Group considers a problem "inadvertent"; however, worse than sixty days means "deliberate."[34] Compared to the DOD CAS Working Group's sixty days, Hughes' hiatus of nineteen months stands far, far out of line.

Moreover, what Hughes did fairly bristles with indicators cited by the DOD CAS Working Group as signs of deliberate, not inadvertent, noncompliance.[35] Nor does Hughes' CAS

AMENDED): . . . . HAVE YOU SUBMITTED A CASB DISCLOSURE STATEMENT (CASB DS 1 OR 2)? YES" J.A. 200.

[33] Hughes' noncompliance period consisted of the incredibly long nineteen months from Hughes' establishing by internal "agreement" on December 14, 1982 its accounting practice for the RDP project, Pet. App. 46a, until Hughes' CAS disclosure by submission on July 3, 1984. J.A. 111. Because the form covered the period to January 1984, that date is recited and used for many purposes. However, the CAS disclosure occurred when Hughes amended its form in July 1984, just as a tax form covers a period until December 31 but is filed March 15.

[34] "Voluntary changes in accounting practices should normally be considered deliberate noncompliances when they are implemented earlier than 60 days after the time the ACO [i.e., the Administrating Contracting Officer (ACO)] has received notice as provided in ASPR 3-1214." *Deliberate Noncompliance* at 6483. The emphasis is on formal notice of the kind that triggers auditor evaluation of the contractor's proposal, which Hughes did not give until July 1984.

[35] For example, Hughes does not plead the sign of "inadvertence" that "the noncompliance resulted from failure [of corporate] employees to follow company policy and instructions." *Deliberate Noncompliance* at 6482. Nor does Hughes plead the sign of inadvertence of a contractor's

disclosure violation concern some minor point. Hughes' practice concerned how to pool its direct costs and allocate them between contracts of different kinds: cost-reimbursement like the B-2, and fixed-price like the F-15. Because late disclosure games of the greatest variety are possible with such mixed contract types, that is the background against which a disclosure violation is the most serious. Moreover, Congress showed its concern with this matter of pools, as most seriously necessitating disclosure, in the statutory phrase immediately following the CAS disclosure condition: the condition requires contractors "to disclose in writing their cost-accounting principles, including methods of distinguishing direct costs from indirect costs and the basis used for allocating indirect costs," § 2168(g), e.g., pools. Accordingly, the official CAS Disclosure Form, CASB-DS-1, emphasizes, too, the seriousness of the point upon which Hughes violated its disclosure duty.[36]

IV. THE DCAA AUDITORS WHO CRITICIZED HUGHES' CAS NONCOMPLIANCE DID NOT PREJUDICE THE JUDICIAL FALSE CLAIMS ACT CASE AGAINST HUGHES BY THEIR ACTIONS ON MERE ADMINISTRATIVE REMEDIES.

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formally-presented, good faith disagreement for which the period of noncompliance is simply the time necessary for resolution. *Id.* at 6483.

[36] That form has as one of its main parts, Part II, the disclosure of "Direct Costs" practices, under which "Labor" is, of course, one of the main categories and "Method" one of the main questions. What Hughes did not disclose was its resort to one of the non-usual methods for direct labor costs. For this, the form naturally has a special entry ("Y. Other") as distinct from the usual methods. *Compare* 37 Fed. Reg. 4139, 4151 (Feb. 29, 1972)(original promulgation of form) *with* J.A. 19 (Hughes' disclosure form)("Direct labor cost . . . is collected in a holding account and is allocated to contracts . . . .").

Although the Government did not prejudice the judicial FCA case against Hughes, Hughes argues that the Government did exactly that. Hughes employs two arguments, each without merit, drawing on the Government's mere administrative actions. First, it argues that when the government administratively released the suspended interim payments, it foreclosed a judicial false claims act remedy "[u]nder black-letter government contracts law." Pet. Br. 44 n.26 (citing J. Cibinic & R. Nash, *Cost-Reimbursement Contracting* 1106 (2d ed. 1993)).

Yet, the Government expressly reserved the issue of CAS noncompliance and false claims remedies when it ceased having the money temporarily withheld. J.A. 137.[37] Moreover, that passage hardly applies in this case, where the record shows only the end of a temporary withholding of funds, not a final settlement. Furthermore, Hughes' supposedly favorable "black-letter government contracts law" turns out to be black-letter government contracts law providing that Hughes remains subject to fraud claims, like this FCA suit, for even final settlements do not bar fraud claims.[38] The administrative

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[37] [T]he Government does not waive rights to a share in any settlement resulting from the parallel qui tam action in the event the relator's case is successful. Second, [an] associated issue of Cost Accounting Standards noncompliance is still open and shall remain so until resolved to Government satisfaction.

J.A. 137. This careful preservation received widespread publicity. An article, "Audits: DOD Release to Hughes Aircraft 15.4M in B2 Radar Funds; Related Qui Tam Suit Filed," BNA Fed. Cont. Rep., Jan. 27, 1992, describes the release of funds and the "two caveats: 1) the government does not waive rights to share in any settlement resulting from a parallel qui tam action; and 2) An associated cost accounting standards noncompliance issue is still open."

[38] The treatise cited by Hughes begins by saying, "Barring *fraud*, mistake, or lack of authority . . . ." Cibinic & Nash, at 1105 (emphasis supplied). That paragraph Hughes quoted as "black-letter" law continues as to what will bind the government "absent *fraud* . . . ." *Id.* (emphasis supplied)(quoting *James Graham Mfg. Co. v. United States*, 91 F. Supp. 715, 716 (N.D. Calif. 1950)). What Hughes refers to as its "black-letter" authority's "citing cases" includes *Leeds & Northrup Co. v. United States*, 101 F. Supp. 999 (E.D. Pa. 1951)(cited by Cibinic & Nash, at 1106), which discusses finality "in the absence of fraud." *Id.* at 1003.

action simply handled Hughes' attempt at having the matter heard in an administrative non-fraud forum. Hughes attempted this by submitting a claim to the contracting officer.[39] The administrative action taken in response to Hughes' claim keeps an FCA case perfectly available, even if the contracting officer made a final settlement, because "[a] contractor's fraud is of course a wholly different genus," not resolved by contracting officers, since "Congress . . . has given the federal courts power to hear and determine such cases." *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 16-17 (1972).

Second, Hughes jumbles together different administrative conclusions that the Court of Appeals had carefully separated. Once the auditors and the contracting officer made, and adhered to, their finding of Hughes CAS disclosure noncompliance, it became their duty to decide whether to trigger an administrative non-fraud proceeding as distinct from leaving the matter to a judicial FCA case. They did a cost-impact study.[40] Such a study does not use FCA judicial-type ques-

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[39] "Under the [Contract Disputes Act], the contracting officer's authority does not extend to `a claim or dispute for penalties or forfeitures prescribed by statute,' such as the FCA, that are within the jurisdiction of another agency. [Footnote citing 41 U.S.C. 605(a)(1982).] Moreover, the `agency head' may not pay or settle `any claim involving fraud.' [Footnote citing *Id.*]" Thomas P. Barletta & Barbara A. Pollack, *Civil Litigation of Allegations of Fraud in Connection with Government Contract Claims*, 18 Pub. Cont. L.J. 235, 248 (1988).

[40] It is the same type study as when contractors make a timely, proper disclosure of an intended change in practices or some other timely, proper CAS disclosure with no element of intentional concealment. Regarding cost-impact studies, see DCAAM, *supra*, 8-500; Cibinic & Nash, *supra*, at 1064-65.

tioning of witnesses for establishing the existence and impact of fraud.[41] That study left unprejudiced the FCA case.

CONCLUSION

Congress wrote the CAS Act, with disclosure as its ironclad "condition of contracting," to protect the great vulnerability of the Treasury to undisclosed accounting techniques of contractors, like Hughes, with their open access to the public till. Hughes' fiscally injurious violation of the express condition supports a False Claims Act case. The Court of Appeals should be affirmed.

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[41] By analogy, a contracting officer might decide to consider the cost-impact from a fraudulent product substitution not to be of the type for pursuing in an administrative remedy. Rather, she might decide to let proceed, instead, a successful False Claims Act proceeding. *See United States v. Aerodex, Inc.*, 469 F.2d at 1007.

Project On Government Oversight

REPORTS

Funds Returned to the United States Government By Defense Contractors and the Health Care Industry Under the False Claims Act, 1994-1996

January 1997

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DEFENSE AND HEALTH CARE INDUSTRIES: RATHER THAN CLEAN UP THEIR ACT, THEY ATTACK THE ACT

The major trade associations for the defense and health care industries have risen up in support of the Hughes Aircraft Company -- the defendant in a pending fraud case before the Supreme Court. Hughes' appeal to the Supreme Court challenges the potency of the False Claims Act. This law, which was inspired by Civil War profiteering, has successfully forced those who defraud the government to pay for their illegal activities. It is not surprising that the defense and health care industries, which account for the overwhelming majority of False Claims Act settlements, are attacking this law.

In 1994, the Project On Government Oversight issued a report that found of the 22 defense contractors who were lobbying the Senate to water down the False Claims Act, 90% had been involved in fraud and abuse in government contracting practices themselves. At the time, those companies had paid over $500,000,000 in penalties and settlements to the government for their alleged fraudulent activities.

Now we see both the defense and the health care industries jumping on the opportunity to weaken this effective law. These associations are arguing in *amicus curiae* briefs to the Supreme Court that this law is being used to unfairly prosecute their members over "regulatory disputes."

The fact is, however, that just **since 1994, the health care industry has repaid the government over $1 billion**[1], **and the defense industry over $800,000,000, due to the False Claims Act.**

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[1] As our survey begins in 1994, this figure does not include some large settlements, such as the $100 million National Health Labs 1992 settlement, nor does it include the approximately $300 million settlement with Smith Kline Beecham expected to be announced by the end of 1996.

This survey is by necessity only a partial listing of settlements and judgements. Many False Claims Act settlements are not made public, and there is no comprehensive database that compiles information on those that are made public. The Project On Government Oversight has made every attempt to avoid duplicate listings of cases. The *qui tam* provision of the False Claims Act allows a person with knowledge of fraud to file a case on behalf of the government. Such cases are noted in the description of the settlements in this survey.

FUNDS RETURNED TO THE UNITED STATES GOVERNMENT BY DEFENSE CONTRACTORS UNDER THE FALSE CLAIMS ACT[2] 1994 - 1996

AGS Food Incorporated

$1.26 million to settle a *qui tam* suit alleging that the company falsified food costs, retained duplicate payments, misrepresented their intentions to pay the government and engaged in price fixing and kickbacks. The company sold commissaries on military bases in California. Defense Contract Litigation Reporter[3] March 24, 1994

Alliant TechSystems Incorporated and Accudyne Corporation

$12 million to settle a *qui tam* suit alleging that Accudyne failed to properly test electronic assemblies

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[2] A few of these cases did not involve defense contracts, but were settlements made by defense contractors who are members of either the Aerospace Industries Association, the Shipbuilders Council of America, National Security Industrial Association or the Electronic Industries Association. These associations have all filed *amici* briefs in *Hughes Aircraft Company v. U.S.* ex rel Schumer.

[3] Henceforth noted as DCLR.

supplied under an Army contract. Federal Contract Report[4] July 3, 1995

AT&T Incorporated

$13.9 million to settle allegations that the company did not provide accurate and complete pricing information on air traffic control equipment. FCR December 26, 1994

Austin Company

$4 million to settle a *qui tam* suit alleging that the company inflated contracts for designing government facilities to cover the cost of its employee pension plan. Department Of Justice[5] press release August 26, 1996

Battelle Memorial Institute

$330,000 to settle a *qui tam* suit alleging that the company used government owned equipment to service commercial customers. FCR June 10, 1996

BDM Federal Incorporated

$375,000 to settle allegations that the company improperly transferred funds from an Air Force contract. Richmond Times-Dispatch March 4, 1996

BEI Sensors and Systems

$1 million to settle a *qui tam* suit alleging that the company failed to properly test devices used to measure the gravitational pull on Air Force planes and pilots. DOJ press release December 6, 1995

[4] Henceforth noted as FCR.

[5] Henceforth noted as DOJ.

B.F. Goodrich Company

$552,500 to settle allegations that the company manufactured defective rafts for the Army. False Claims Act & Qui Tam Quarterly Review[6] October 1995

Boeing

$75 million to settle allegations that the company overcharged and mischarged military contracts. DCLR May 12, 1994

Computer Tape Source Incorporated

$146,000 to settle allegations that the company presented old computer tapes as new. Department Of Defense Inspector General Semi-Annual Report to Congress[7] October 1, 1993 - March 31, 1994

Dana Corporation

1. **$19.5 million** to partially settle allegations that the company overcharged parts sold to the Army, the Air Force and the Navy. FCR October 2 1995

2. **$10.2 million** to settle the remaining portion of the above settlement. This allegation pertained to the Beaver Precision Products division overcharging missile and aircraft parts. DOJ press release May 31, 1996

Deloitte & Touche, LLP

$396,000 to settle a *qui tam* suit alleging that the company submitted false claims in connection with

[6] Henceforth noted as QTQR.

[7] Henceforth noted as DOD IG SAR.

consulting contracts with the Bonnerville Power Administration and the DOJ. QTQR April 1996

DynCorp

$250,000 to settle a *qui tam* suit alleging that the company did not perform maintenance and other services at Fort Belvoir. DOD IG SAR October 1, 1994-March 31, 1995

Equipment And Supply Incorporated

$1.4 million to settle a *qui tam* suit alleging that the company's parts and services equipment did not meet contract specifications. DOJ press release December 15, 1994

Ethyl Corporation

$4.75 million to settle a *qui tam* suit alleging that the petroleum additives it sold companies for use in military vehicles did not meet military specifications or pass required testing. FCR April 29, 1996

Fairchild Industries

$8.2 million to settle a *qui tam* suit alleging that the company submitted false statements to the Air Force. DOD IG SAR October 1, 1994-March 31, 1995

FMC Corporation

$13 million to settle a *qui tam* suit alleging that the company inflated independent research and development and bid and proposal costs for the Bradley Fighting Vehicle and the M113 tank. DOJ press release October 8, 1996

General Dynamics Corporation

$1.8 million to settle a *qui tam* suit alleging that the company overbilled F-16 testing. QTQR April 1995

General Electric Company

1. **$7.1 million** to settle a *qui tam* suit alleging that the company failed to satisfy electrical bonding requirements for its jet engine contracts, thereby creating a safety risk. FCR August 14,1995

2. **$5.87 million** paid by GE and Martin Marietta, to settle a *qui tam* suit associated with improper sales of radar system to Egypt. DCLR January 26, 1995

Grumman Corporation

$2.2 million to settle allegations that a former Grumman Data Systems vice-president knowingly overstated the cost of installing a supercomputer for NASA. This settlement was in addition to a previous partial settlement of **$1.1 million**. FCR July 11, 1994

GTE

1. **$3.25 million** to settle allegations that the company improperly increased overhead rates. DCLR March 10 1994

2. **$3.2 million** paid by GTE Government Systems Corporation and Canadian Marconi Corporation, to settle a *qui tam* suit alleging that the company did not inform the Army concerning radios that did not meet requirements. FCR July 17, 1995

Harris Corporation

1. **$1.6 million** to settle allegations that it improperly obtained confidential information to win a contract with the Federal Emergency Management Agency. DOJ press release June 21, 1995

2. **$1.5 million** to settle allegations that it overestimated labor costs in a Navy contract. FCR May 8, 1995

Hughes Aircraft Company, Incorporated

$4.05 million to settle a *qui tam* suit alleging that the company failed to perform tests on electronic equipment for the military. DOJ press release September 10, 1996

Infotec

$1.3 million paid by company and CEO Fernando Niebla to settle allegations that the company made false statements to receive an Air Force contract. Boston Herald July 30, 1996

Israel Aircraft Industries Ltd.

$8.5 million (plus interest) to settle allegations that the company knowingly submitted false cost data in negotiating several Navy contracts. FCR July 24, 1995

Korry Electronics

$250,000 to settle allegations that the company made unauthorized design changes on switches for the Defense Department. DCLR May 12, 1994

Litton Industries

$82 million to settle a *qui tam* suit alleging commercial data processing costs were passed on to the government. FCR July 18, 1994

Lockheed

1. **$6.3 million** to settle allegations that the company withheld cost information that inflated the contract price. FCR December 26, 1994

2. **$500,000** to settle allegations that Randtron Systems Incorporated, a unit of Lockheed, did not give the government relevant information that would have lowered the price of military contracts for radar antennas. DOJ press release October 18, 1996

Lucas Industries

$88 million to settle a *qui tam* suit alleging defective parts and falsification of data for the Navy's F/A-18. FCR October 9, 1995

Martin Marietta

See second listing under GE.

Monroe Wire and Cable Corporation

$532,000 to settle allegations that the company's cable did not meet specifications. DOD IG SAR October 1, 1993-March 31, 1994

Parker-Hannifin

$7.8 million to settle allegations of mischarging and defective pricing, as well as misrepresentations in their submission to the DOD Voluntary Disclosure Program. DOJ press release September 15, 1994

Parsons Engineering

$3.2 million to settle a *qui tam* suit alleging the company overcharged on labor costs for environmental surveys and similar services at Brooks Air Force Base, TX. FCR October 16, 1995

Philips Electronics North America Corporation

$65.3 million settlement for selling improperly tested capacitors and resistors for a number of military and aerospace programs. This amount includes the **$9.6 million** submitted by Philips in 1992 through the DOD Voluntary Disclosure Program. DOJ press release February 26, 1996

Pneumo Abex Corporation

$12.5 million to settle allegations that the company mischarged labor costs. DOJ press release January 2, 1996

PRC

$72,500 to settle a *qui tam* suit alleging that the company falsely billed the Commerce Department for equipment that was not delivered. FCR May 23, 1994

Richardson Electronics

$4.7 million to settle allegations that it falsely stated it could manufacture night vision military equipment and passed off another company's equipment as its own. DOJ press release June 1, 1995

Rockwell International Corporation

$27 million to settle allegations that the company did not provide accurate, complete, and current information involving the B1-Bomber. FCR August 7, 1995

Raytheon

$4 million to settle allegations the company inflated missile detection site contract prices. FCR November 11, 1994

Science Applications International Corporation

1. **$2.5 million** to settle a *qui tam* suit alleging that Science Applications International Technology failed to perform its contract and misled the Air Force about its work. FCR December 25, 1995

2. **$230,000** paid by Science Applications International Corporation, AlliedSignal Technical Services Corporation and Lloyd Electric Company to settle allegations that they improperly tested electric cables. DOJ press release May 10, 1995

SL Industries and SL Auburn Incorporated

$600,000 to settle a *qui tam* suit alleging that the companies produced defective and substandard aircraft and tank engine igniters. FCR December 4, 1995

SMTEK Incorporated

$200,000 to settle a *qui tam* suit alleging that the company falsely represented its capability to test space station components. FCR June 5, 1995

Support Systems Associates, Incorporated

$400,000 to settle allegations of cost mischarging including cross-charging labor hours and billing for services not provided. DOD IG SAR April 1, 1994-September 3, 1994

Systems Engineering and Management Associates Incorporated

$765,000 to settle a *qui tam* suit alleging that the company overcharged for labor and overhead. FCR August 15, 1994

Teledyne Industries Incorporated

1. **$85 million** to settle a *qui tam* suit alleging the Teledyne Relays division falsely certified relay switches sold to the U.S. military. DCLR April 28, 1994
2. **$27.5 million** to settle a *qui tam* suit alleging Teledyne Systems arbitrarily inflated cost data and represented it as current, accurate, and complete. DCLR April 28, 1994
3. **$5.65 million** to settle a *qui tam* suit alleging the company charged the government for nonproductive time and did not properly test "identification friend or foe" systems for military aircraft. FCR October 24, 1994
4. **$2 million** to settle a *qui tam* suit alleging that the company improperly tested and failed to calibrate test equipment in manufacturing "identification friend or foe" components for the Air Force. FCR November 13, 1995
5. **$850,000** to settle a *qui tam* suit alleging defective pricing when the company charged the government for less costly equipment that the company already had in stock. DOJ press release November 10, 1994
6. **$500,000** to settle allegations that Teledyne Electronics substituted parts and failed to perform required tests in connection with radar test sets supplied to the Army. DOJ press release December 6, 1994

TRW Incorporated

$29 million to settle allegations of mischarging labor costs on military subcontracts. DCLR May 12, 1994

United Technologies

$150 million to settle a *qui tam* suit alleging that its Sikorsky Aircraft Division prematurely billed work not yet performed on a helicopter contract with the U.S. military. This settlement followed an allegedly inadequate DOD voluntary disclosure. DCR April 14, 1994

Varo Incorporated (Imo Industries Incorporated)

$2 million to settle a *qui tam* suit alleging that Varo, its Ni-Tec division and Optic Electronic Corporation delivered night vision equipment components for the Army that did not meet reliability and testing requirements. DOJ press release July 18, 1996.

Westinghouse Electric Corporation

$1.88 million to settle allegations that the company did not tell the Air Force about other sales of spare parts that should have lowered the unit cost. This amount includes the $258,030 paid to the Air Force under the DOD Voluntary Disclosure Program. DOJ press release December 12, 1994

FUNDS RETURNED TO THE UNITED STATES TREASURY BY THE HEALTH CARE INDUSTRY UNDER THE FALSE CLAIMS ACT 1994-1996

HOSPITALS AND OTHER HEALTH CARE PROVIDERS

Caremark Incorporated

$141 million civil and $20 million criminal settlement for alleged kickbacks and fraud in its home infusion, oncology, hemophilia and human growth hormone businesses. Payments were allegedly made to doctors to refer patients to the company. U.S. Attorney, Southern District of Ohio press release April 22, 1996

Charter Westbrook Behavioral Health Systems Incorporated - Virginia

$2 million to settle a *qui tam* suit alleging improper compensation to physicians for referrals. DOD IG SAR October 1 94-March 31 95

CHR Claridge House - Florida

$415,000 for allegedly improperly billing the government for medical supplies in treatment of CHR residents using a third party billing agent, Handle With Care. Settlement Agreement March 27, 1995

Clinical Practices of the University of Pennsylvania

$30 million settlement for alleged inadequate documentation and false Medicare billings by attending physicians for services performed by residents in training. QTQR January 1996

First American Health Care of Georgia

$20 million of a **$255 million** settlement for overbilled and fraudulent Medicare claims by the home

health care company. DOJ press release October 18, 1996

Florida Club Care Center

$245,488 for allegedly submitting claims for supplies used by residents that had not been used, also using Handle With Care as the billing agent. DOJ press release June 23, 1995

GMS Management-Tucker, Incorporated et al.

$600,000 settlement for allegedly not providing adequate nutritional or wound care needs to their nursing home residents, yet billing for these services to Medicaid and Medicare. QTQR July 1996

Health Care Capital, Central Park Lodges, Health Resources Northwest

$2.2 million to settle allegations that these three companies that manage nursing homes and nursing facilities submitted false Medicare bills for supplies. DOJ press release December 1, 1995

Mt. Sinai Medical Center of Cleveland

$472,000 for allegedly resubmitting Medicare claims for blood work under new codes after having been denied reimbursement for them. DOJ Health Care Fraud Report[8] FY 94.

National Medical Enterprises

$324 million civil settlement for allegedly paying kickbacks for patient referrals and providing unnecessary treatment at psychiatric hospitals in 30 states. **Criminal fines and penalties totalled $53 million.** Settlement Agreement June 29, 1994

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[8] Henceforth noted as DOJ HCFR.

Northwestern Institute of Psychiatry (Matrix Health Management)

$1.4 million for allegedly referring railroad employees for unnecessary drug and alcohol treatment and paying kickbacks to a firm that recruited patients. DOJ HCFR FY94

"Ohio Hospital Project"

$6.6 million settlement by 17 Ohio hospitals for allegedly billing Medicare and Medicaid for individual blood tests even though they were performed in "bundles" on automated machines. Cleveland Plain Dealer, Dec. 4, 1996

Park Medical Center - Ohio

$1.45 million settlement for allegedly billing Medicare and Medicaid for geriatric psychiatric services that were not reasonable or necessary. QTQR October 1996

Pineville Community Hospital Association, Incorporated et al. - Kentucky

$2.5 million to settle a *qui tam* suit alleging fraudulent billing by a hospital association and two doctors, over a ten year period, for work not performed. QTQR July 1995

Respro - Kentucky

$90,000 for allegedly participating in a scheme to increase the volume of Medicare claims so it could boost reimbursements to itself. DOJ press release Sept. 29, 1994

"72 Hour Rule" Investigation

$3.4 million settlement paid by 83 Massachusetts hospitals for alleged duplicate billing to Medicare.

Massachusetts General Hospital paid the highest fine --**$400,000.** This settlement is part of an ongoing nationwide government probe into Medicare outpatient billing practices. DOJ press release May 22, 1996

Sterling Medical Associates -Ohio

$700,000 to settle a *qui tam* suit alleging Sterling, a provider of civilian physicians to military hospitals, misrepresented the size of the company to obtain federal small business contracts. Government Contract Litigation Reporter, Jan. 4, 1996

Sutter Memorial Hospital - California

$1.265 million to settle a *qui tam* suit alleging improper billing for cardiac device implant procedures not covered by Medicare. Part of ongoing *qui tam* suit against 130 hospitals for improperly charging Medicare for experimental medical devices. DOJ press release February 14, 1996

T2 Georgia

$500,000 from national provider of outpatient and home infusion therapy for allegedly offering stock options to physicians in exchange for referrals. DOJ press release Sept. 26, 1994

Thomas Jefferson University and the Jefferson Faculty Foundation - Pennsylvania

$12 million settlement for alleged inadequate documentation and billings by attending physicians when residents actually performed the services. QTQR October 1996

U.S. HomeCare Corporation

$650,000 to settle a *qui tam* suit alleging submission of false Medicare claims, and inadequate

documentation including forged nurses signatures and "canned" nursing notes in their Miami operations. QTQR July 1995

MEDICAL EQUIPMENT AND DRUGS

Advanced Care Associates, Incorporated et al.

$4.03 million to settle a *qui tam* suit for allegedly falsifying documents on the medical condition of Medicare beneficiaries to obtain reimbursement for lymphedema pumps. DOJ press release June 19, 1996

Becton Dickinson & Company

$3.3 million to settle a *qui tam* suit for allegedly overcharging the Department of Veterans Affairs for medical equipment for microbiological tests. DOJ press release June 19, 1995

Circa Pharmaceutical Incorporated

$2.7 million settlement for allegedly selling untested generic drugs to Medicare, Medicaid, and the Department of Veterans Affairs. DOJ press release March 28, 1996

Curative Industries Incorporated, UltraMed Incorporated

$2.1 million to settle a *qui tam* suit for allegedly submitting Medicare claims for lymphedema pumps that did not meet engineering requirements. DOJ HCFR FY94

Huntleigh Technology

$4.9 million to settle a *qui tam* suit alleging false representations to dealers and suppliers that it qualified for Medicare's highest reimbursement rate for their lymphedema pump, causing the dealers and suppliers to

submit false claims for reimbursement. Settlement Agreement, July 24, 1995

Medline Industries

$6.4 million to settle a *qui tam* suit for alleged submission of thousands of false invoices for health care products, equipment and supplies to the Department of Veterans Affairs. Medline failed to disclose that certain of its items were manufactured in non-designated countries. QTQR July 1996

Modern Wholesale Drug Midwest, Incorporated (Rugby Laboratories)

$7.5 million to settle a *qui tam* suit for allegedly overcharging Department of Veterans Affairs for generic drugs. DOJ press release, October 31, 1995

National Medical Systems

$1.5 million to settle a *qui tam* suit for alleged billing of Medicare for top-of-the-line lymphedema pumps when it actually provided much cheaper equipment. Settlement Agreement, September 29, 1995

Shiley Incorporated, Pfizer Incorporated

$10.75 million settlement for alleged false claims on potentially fatal artificial heart valves. FDA approval of the valves was based on false statements. DOJ HCFR FY94

Summit Healthcare Systems, Incorporated and Global Medical Systems, Incorporated

$500,000 for allegedly overbilling Medicare by as much as 700% for durable medical equipment. DOJ press release June 11, 1996

Superior Surgical Manufacturing Co., Incorporated

$6.5 million settlement for allegedly overcharging the Department of Veterans Affairs, the General Services Administration and other agencies for medical and clothing items. **Superior pled guilty to a one-count felony information.** QTQR July 1996

United States Surgical Corporation

$10 million settlement for alleged failure to disclose accurate and complete pricing information to government negotiators for surgical instruments. DOJ press release December 7, 1995

MEDICAL LABORATORIES

Allied Clinical Laboratories, Incorporated

$4.9 million to settle a *qui tam* suit for alleged false claims for Medicare reimbursement of laboratory tests to Medicare. DOJ press release March 20, 1995

Corning Clinical Laboratories Incorporated

1. **Damon Clinical Laboratories, Incorporated**

   $84 million to settle a *qui tam* suit and **$35 million criminal fine** for allegedly manipulating doctors to order blood tests that were not medically necessary and improperly billing the tests to Medicare. Damon is currently owned by Corning Clinical Laboratories. DOJ press release October 9, 1996

2. **Metpath Incorporated**

   $8.6 million to settle a *qui tam* suit for allegedly submitting claims to Medicare and Medicaid for lab tests not performed. Metpath is owned by Corning Clinical Laboratories. QTQR July 1995

3. **Metpath Incorporated**

   $7 million to settle a *qui tam* suit (along with $4 million by Unilab Corp.) for allegedly billing for certain blood tests that were not ordered or medically necessary. QTQR October 1996

4. **Bioran**

   $6.675 million settlement for allegedly manipulating doctors into receiving medically unnecessary tests whenever doctors ordered simple blood tests. These were then improperly billed to Medicare. Bioran is owned by Corning Clinical Laboratories. Settlement Agreement Feb. 1996

Laboratory Corporation of America

$182 million *qui tam* settlement, plus a **criminal fine of $5 million**, for allegedly billing Medicare for lab tests that were not performed, or that had not been requested by physicians. DOJ press release, November 21, 1996

Unilab Corporation

$4 million to settle a *qui tam* suit (along with $7 million by Metpath Incorporated) for allegedly billing for certain blood tests that were not ordered or medically necessary. QTQR October 1996

RESEARCH COLLEGES AND UNIVERSITIES

The Board of Trustees of the University of Alabama et al.

$1.66 million judgement in *qui tam* case for false representations on grant proposals and progress reports to NIH. QTQR July 1995

Henry M. Jackson Foundation for the Advancement of Military Medicine

$45,920 to settle a *qui tam* suit for alleged mischarging labor, training and research costs not covered in NIH contract for radiology services. QTQR July 1995

University of Utah, University of California and Dr. Ninneman

$1.6 million to settle a *qui tam* suit alleging the two Universities ($950,000 paid by University of Utah and $625,000 paid by University of California) knowingly allowed Dr. Ninneman to falsely report research results to NIH. DOJ HCFR FY94

AMBULANCE SERVICES

Crescent City EMS, Inc - Louisiana

$1.86 million to settle a *qui tam* suit alleging billing for ambulance service for Medicare dialysis patients who they claimed as being confined to bed when they could actually walk. DOJ HCFR FY94

Fire Protection District No. 5, Mason County et al. - Washington State

$160,000 to settle a *qui tam* suit alleging fraudulent billing for ambulance services. QTQR July 1996

Health Careers, Incorporated et al.

$12 million settlement for allegedly billing for ambulance services for Medicare beneficiaries when they were in fact transported in passenger vans, as well as billing for patients whose medical condition did not require transportation by ambulance. Settlement Agreement April 25,1996

Professional Ambulance Service Incorporated, L&M Ambulance Corporation and Trinity Ambulance Corporation of Connecticut

$700,000 settlement by three ambulance companies for allegedly billing Medicare for unnecessary services. DOJ press release December 18, 1996

INSURANCE PROVIDERS

Blue Cross Blue Shield of Florida

$10 million to settle a *qui tam* suit alleging mishandling of claims and knowingly choosing a data processing firm that could not handle the claims volume. DOJ HCFR FY94

Blue Cross Blue Shield of Massachusetts

$2.75 million to settle a *qui tam* suit for allegedly submitting false Medicare reports.

Blue Cross Blue Shield of Michigan

1. **$27.6 million** to settle a *qui tam* suit alleging improper billing and submitting false documentation to Medicare, and inadequate audits of hospital cost reports. DOJ Press release January 18, 1995
2. **$24 million** settlement for unlawfully billing Medicare for thousands of claims that should have been paid from private insurance funds. DOJ press release January 18, 1995.

Provident Accident Life and Accident Insurance Co.

$27 million to settle a *qui tam* suit for alleged false Medicare billing. National Health Lawyers News Report, May 96.

PHYSICIANS

Dr. Anthony et al. - Ohio

$1.52 million *qui tam* settlement by nine physicians and their medical imaging corporations for alleged improper Medicare and Medicaid referrals to diagnostic firms in which the doctors had a financial interest. QTQR July 1995

Dr. Marlou Davis - Missouri

$4.1 million judgement for soliciting elderly patients from nursing homes, supermarkets, malls and drug stores and promising them early detections of illnesses including heart disease and strokes. He then charged Medicare for the tests. BNA Medicare Report October 25, 1996

Dr. Jaramillo, Medical Institute for Mental Health, and Memorial Hospital - New Mexico

$700,000 to settle a *qui tam* suit alleging billing Medicare, Medicaid and CHAMPUS for psychiatric services that were not provided or were provided by a non-physician assistant without appropriate supervision. QTQR July 1996

Dr. Schwartz, Dr. Barr & Dr. Silver et al. - Washington, DC

$278,800 to settle a *qui tam* suit against group of doctors for allegedly billing for chemotherapy treatment even though the treatment was provided by nurses, and no doctors were present at the hospital at the time of treatment. DOJ press release, July 24, 1996

Dr. Schwartzman, MD and The Brooklyn Hospital Center - New York

$875,000 settlement to settle a *qui tam* suit ($25,000 by Dr. Schwartzman personally) for alleged false claims of having performed full medical exams on Social Security Administration disability applicants, when in fact only brief interviews were performed. QTQR January 1996

Dr. Wurtzel, MD and Life Centers Limited - Pennsylvania

$500,000 paid by physician/owner of mental health clinic to settle a *qui tam* suit for allegedly fraudulently charging Medicaid for services never performed or otherwise not reimbursable. QTQR January 1996

(22)

No. 95-1340

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1996

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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No. 95-1340

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

Hughes Aircraft Company,

Petitioner,

v.

United States *ex rel.* William J. Schumer,

Respondent.

BRIEF *AMICUS CURIAE* OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 2,000 lawyers who represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members counsel, and litigate on behalf of, employees regarding claims arising in the workplace.

NELA has an interest in this appeal because members of NELA increasingly have been called upon to counsel whistleblowers—employees who disclose fraud or other illegal conduct on the part of their employers. The False Claims Act is implicated whenever the employer in such a case is a Government contractor.

In this brief, NELA writes in support of Respondent Schumer on two points. *First*, that neither actual damages nor "harm to the public fisc" are an element of a cause of action under the False Claims Act (FCA). *Second*, that a disclosure which is limited to employees of the targeted contractor or contractors is not a public disclosure within the meaning of 31 U.S.C. § 3730(e)(4).

The positions taken by NELA in this brief have not been approved or financed by Respondent or his counsel.

Written consent for the filing of this brief has been obtained from Petitioner and Respondent, and these letters of consent have been filed with the Clerk pursuant to Sup. Ct. Rule 37.3.

SUMMARY OF ARGUMENT

Petitioner and its *amici* take different tacks in seeking to persuade this Court to reverse 50 years of consistent court decisions that damages need not be proven for civil penalties to be recoverable under the civil False Claims Act. Petitioner argues that the "public fisc" must be "implicated"; its *amici* say that actual monetary loss to the Government is an element of a claim under the FCA. However, this Court and many lower courts have so held, and legislative history reflects that Congress fully intended to embody the rule that actual damages are not necessary in the 1986 amendments to the Act. Therefore, both Petitioner and the *amici* advance propositions which fly in the face of settled law and the intent of Congress. Rather than accept their invitations to radical change, this Court should affirm the court of appeals and thereby reaffirm the long-standing principle that actual damage is not an

element of a claim under the FCA.

As to the question of what constitutes "public disclosure" for purposes of the jurisdictional aspect of 31 U.S.C. § 3730(e)(4), Petitioner would have this Court conclude that when employees of a Government contractor who are not active participants in contract fraud learn of facts supporting a *qui tam* claim from an audit report which is not publicly available, that constitutes "public disclosure" of those facts. This position was properly rejected by the Ninth Circuit, because the plain words of the statute mean that there must be a general dissemination of facts before they have been "publicly disclosed."

ARGUMENT

I. THE CONTENTION THAT DAMAGE TO THE UNITED STATES IS A REQUIRED ELEMENT OF PROOF FOR RECOVERY UNDER THE FALSE CLAIMS ACT IS OBVIOUSLY WRONG.

This Court should flatly reject the claims of certain of the *amici* supporting Petitioner that, in the words of one of them, "harm to the public fisc is an essential element for a cause of action under the False Claims Act." Brief of *Amici Curiae* Association of American Medical Colleges, *etc.* (hereafter the "Medical *amici*"), at 20. This assertion stands in direct opposition to five decades of judicial precedent, soundly based upon decisions of this Court, as well as the clearly-expressed Congressional endorsement of that body of case law. Petitioner and its *amici* have failed to acknowledge both the wealth of precedent and clear statements of congressional intent arrayed in

opposition to their position, thus tacitly conceding that their arguments are merely what they wish the law to be—rather than what the law is.

A. This Court's Decisions Establish That Damages Are Not An Element Of A Successful Cause Of Action Under The Act

The proposition that actual damages need not be proven in order to recover under the civil False Claims Act is firmly based on decisions of this Court. The cases most often cited are *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956) and *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

In *Hess*, this Court affirmed the district court's conclusion that "failure to show actual damages in these instances [where the Government apprehended the false claims before making payment] would not preclude recovery" under the False Claims Act. *United States ex rel. Marcus v. Hess*, 41 F.Supp. 197, 218 (W.D. Pa. 1941).

In *Rex Trailer*, the Court affirmed a finding of civil-penalty liability against a company which fraudulently took advantage of the veterans' preference in the Surplus Property Act to purchase war-surplus trucks. The Government sued the company. The complaint did not allege damages.

In this Court, Rex Trailer asserted that "the failure of the Government to allege specific damages precludes [civil-penalty] recovery here." 350 U.S. at 152. The Court rejected this proposition, likening the civil penalty to

liquidated-damage provisions, which "'serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many Government contracts ....'" *Id.* at 153, *quoting Priebe & Sons v. United States*, 332 U.S. 407, 411-12 (1947).

In rejecting the claim that actual damages must be alleged to state a claim under the Surplus Property Act, the Court relied upon the reasoning of *Hess*. The Court observed that the Surplus Property Act *was* "essentially the equivalent" of the False Claims Act. *Rex Trailer*, 350 U.S. at 152. Holding that "the fact that no damages are shown is not fatal" (*id.* at 153), the Court endorsed *Hess's* affirmance of the district court's holding that actual damages were not a predicate to recovery under the statute. 350 U.S. at 153 n.5. Confronted by a silent record, the Court inferred that "the fact that Rex was willing to resort to fraud to purchase the vehicles at the veteran's price strongly suggests an unfair gain from the purchases." *Id.* at 153 n.6.

Beyond *Hess* and *Rex Trailer*, this Court has demonstrated unflagging awareness that the submission to the United States of false contract claims causes harm to the integrity of the Government, including social and investigative costs, which extend well beyond "actual" damages. *E.g.*, *United States v. Halper*, 490 U.S. 435, 450-52 (1989) (referring to compensation under the FCA for the "costs [to the Government] of corruption" and remanding for determination of the Government's "actual costs" in the case, including costs of investigation]. The Court recognized in *Rex Trailer* that Congress has the authority to legislate against such claims in a manner which obviates the need for proof of such damages. There is no conceivable reason for this half-century of

consistent jurisprudence to be jettisoned, as Petitioner and its *amici* apparently urge.

B. Dozens of Published Opinions Demonstrate That Damage To The United States Is Not An Element Of Recovery Under The Act.

The subordinate federal courts, based upon obviously-correct readings of *Hess* and, later, *Rex Trailer*, "have always rejected the argument that the United States must suffer actual damages before the [civil] penalties under [the FCA] may be collected." *United States v. Cherokee Implement Company*, 374 F.Supp. 374, 375 (N.D. Iowa 1963) (collecting cases). At least three circuit courts of appeal had so held in the two decades preceding *Cherokee Implement*. *United States v. Rigdlea State Bank*, 357 F.2d 495, 497 (5th Cir. 1966); *Toepleman v. United States*, 263 F.2d 697, 699 (4th Cir.), *cert. denied sub nom. Cato v. United States*, 359 U.S. 989 (1959). *United States v. Rohleder*, 157 F.2d 126, 129 (3d Cir. 1946). Since *Cherokee Implement*; well over a score of published opinions holding that damages need not be proven in order to recover under the Act demonstrate great uniformity of judicial thought on this point.[1]

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[1] *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991); *United States v. Killough*, 848 F.2d 1523, 1533 (11th Cir. 1988); *United States v. Hughes*, 585 F.2d 284, 286 n.1 (7th Cir. 1978); *United States ex rel. Weinberger v. Equifax, Inc*, 557 F.2d 456, 460-61 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *Brown v. United States*, 524 F.2d 693, 706 (Ct. Cl. 1975); *United States v. State Bank*, 357 F.2d 495, 497 (5th Cir. 1966); *Toepleman*, 263 F.2d at 699; *United States v. Tieger*, 234 F.2d

Occasional contrary holdings have either ended up in judicial Siberia, or, upon close examination, prove to be consistent with the substantial weight of authority.[2]

589, 590 & n.4 (3d Cir), *cert. denied*, 352 U.S. 941 (1956); *United States v. Rohleder*, 157 F.2d 126, 129 (3d Cir. 1946); *United States ex rel. Fahner v. Alaska*, 591 F.Supp. 794, 798 (N.D. Ill.1984); *Fleming v. United States*, 336 F.2d 475, 480 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965); *United States ex rel. Pogue v. American Healthcorp, Inc.*, 914 F.Supp. 1507, 1509 (M.D. Tenn. 1996); *Wilkins ex rel. United States v. State of Ohio*, 885 F.Supp. 1055, 1060 (S.D. Ohio 1995); *United States ex rel. Fallon v. Accudyne Corp.*, 921 F.Supp. 611, 628 (W.D. Wis. 1995); *United States v. Kensington Hospital*, 760 F.Supp. 1120, 1227 (E.D. Pa. 1991); *United States ex rel. Luther v. Consolidated Industries, Inc.*, 720 F.Supp 919, 923 (N.D. Ala. 1989); *United States v. CFW Construction Co*, 649 F.Supp 616, 618 (D.S.C. 1986); *Blusal Meats, Inc. v. United States*, 638 F.Supp. 824, 827 (S.D.N.Y. 1986); *Thevenot v. National Flood Insurance Program*, 620 F.Supp. 391, 396 (W.D. La. 1985); *United States v. Rapoport*, 514 F.Supp. 519, 524 (S.D.N.Y. 1981); *United States v. Zulli*, 418 F.Supp. 252, 253 (E.D. Pa. 1975); *United States v. Silver*, 384 F.Supp. 617, 620 (E.D.N.Y. 1974), *aff'd mem.*, 515 F.2d 505 (2d Cir. 1975); *United States v. Johnston*, 138 F.Supp. 525, 527-28 (W.D. Okla. 1956); *United States v. American Precision Products Corp.*, 115 F.Supp. 823, 827-828 (D.N.J. 1953).

[2]Courts have from time to time included, in general recitations of the elements of a claim under the Act, an element of damages. *E.g.*, *United States ex rel. Stinson v. Provident Life & Accident Ins. Co.*, 721 F.Supp. 1247, 1258-59 (S.D. Fla. 1989), *citing Blusal Meats, Inc. v. United States*, 638 F.Supp. 824, 827 (S.D.N.Y. 1986). However, such statements are uniformly *dicta*; for example, in *Blusal Meats*, the district court—in the same paragraph as its statement that the elements of a claim included "(4) that the United States

In sum, both *Hess* and *Rex Trailer* provide a solid foundation upon which literally dozens of federal judges, who have concluded that damages need be neither plead nor proven in a case under the False Claims Act, have built a solid wall which Petitioner and its *amici* now wish to tear down.

C. THE LEGISLATIVE HISTORY OF THE 1986 AMENDMENTS TO THE ACT DEMONSTRATES THAT CONGRESS UNDERSTOOD THAT DAMAGES WERE NOT AN ELEMENT OF A CAUSE OF ACTION UNDER THE FALSE CLAIMS ACT, AND EXPLICITLY APPROVED THAT RULE.

The 1986 amendments to the False Claims Act, Pub. Law 99-562 (99th Cong., 2d Sess.) resulted from adoption of the Senate bill, S. 1562. The Senate Report, in a section entitled "History of the False Claims Act and Court Interpretations," set out the Judiciary Committee's understanding that "[t]he United States is entitled to recover [civil penalties] *solely upon proof that false claims were made, without proof of any damages.*" S. Rep. No. 99-345, 99th Cong., 2d Sess. at 8, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5266, 5273 (emphasis supplied), *citing Fleming v. United States*, 336 F.2d 475, 480 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965). The

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suffered damages as a result of the false or fraudulent claim," 638 F.Supp. at 827—added, *"the United States may recover costs and a $2,000 civil penalty for each FCA violation in the absence of proof of damage to the United States."* *Id.* (italics supplied). In *Wilkins ex rel. United States v. State of Ohio*, 885 F.Supp. 1055, 1059 (S.D. Ohio 1995), the district court sets out a similar boilerplate recitation of elements— but says, a page later, that "no damages need be proved in order to recover the civil penalty" provided for by the Act. *Id.* at 1060.

Committee also said:

> The cost of fraud cannot always be measured in dollars and cents .... GAO pointed out ... that fraud erodes public confidence in the Government's ability to efficiently and effectively manage its programs. Even in the cases where there is no dollar loss—for example where a defense contractor certifies an untested part for quality yet there are no apparent defects—the integrity of quality requirements in procurement programs is seriously undermined.

S. Rep. No. 99-345 at 3, 1986 U.S. Code Cong. & Ad. News at 5268. Consistent with such cases as *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429 (Ct. Cl. 1994),[3] the Senate Report makes clear that the 1986 amendments were intended to reach claims which "may be false even though the services are provided as claimed if, for example, the claimant is ineligible to participate in the program[.]" *Id.* at 9, 1986 U.S. Code Cong. & Ad. News at 5274.

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[3] In *Ab-Tech*, a construction contractor falsely represented that it was eligible for participation in a minority set-aside program. The court of claims held that civil penalties were available to the United States, although the Government got all it bargained for in contract, because the contractor was ineligible to participate in the program pursuant to which the contract was awarded. *Ab-Tech* is analytically quite close to *Rex Trailer*; in neither case was there the direct assault upon the Treasury which Petitioner would have the Court mandate.

Even a silent Congress is presumed to be aware of preexisting case law interpreting statutes. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Where an amending Congress does not take explicit note of existing law, it may be viewed as agreeing that the courts have properly interpreted it. *Cf. Bob Jones University v. United States*, 461 U.S. 574, 599-601 (1983) (Congressional failure to modify well-known administrative regulations may be viewed as Congressional endorsement of agency's interpretation of statute).

Here, Congress repeatedly took explicit note of the no-actual-damages jurisprudence which had developed over the four decades before it undertook the 1986 amendments. The Senate Report indicates obvious approval of that jurisprudence. There is not the slightest indication that the Judiciary Committee intended the 1986 amendments to the Act to vitiate or mitigate the no-actual-damages rule. There is, in short, no reason whatever for this Court to do any more than reiterate that actual damages are not an element of a cause of action under the False Claims Act.[4]

II. PETITIONER'S ARGUMENT THAT THE "PUBLIC FISC" MUST BE IMPLICATED IN A CIVIL FALSE CLAIMS ACT CASE IS UNSUPPORTED BY THE JURISPRUDENCE AND INCONSISTENT WITH CONGRESSIONAL PURPOSE

Petitioner's position appears to be somewhat less aggressive than the "actual damage must actually be proven" assertion of the Medical *amici*.[5] The crux of Petitioner's argument on the question whether "the public fisc" must be implicated in a civil False Claims Act case is its assertion that "[t]he statute does not target any and all transgressions by a Government contractor. Rather, it targets a specific type of transgression: the submission of

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[4] Petitioner and its many *amici* are conspicuously silent on the legislative approval given the no-actual-damage jurisprudence in the course of the process leading to passage of the 1986 amendments. Their unwillingness even to attempt to show that the interpretation of the statute they now urge upon this Court is consistent with the intent of Congress speaks eloquently to its weakness.

[5] The suggestion by the Medical *amici* that "instances of fraud with potential—but still inchoate—fiscal ramifications do not fall within the scope of the FCA" (*Br. Med. Amici* at 25) departs so far from the cases and the intent of Congress as to merit only marginal attention. This claim is precisely contrary to this Court's affirmance, in *Hess*, 317 U.S. 537, of the district court's conclusion that actual damages need *not* be shown in such instances. It is also directly contrary to the only court of appeals case which lends even a modicum of support to Petitioner's argument, *United States v. Azzarelli Construction Co.*, 647 F.2d 757, 760-61 (7th Cir. 1981), which (interpreting the pre-1986 iteration of the FCA) spoke of the need to establish "injury" but held that unpaid false claims *caused* "injury." The unwillingness of the *amici* to concede this elemental point demonstrates well that what they advance is a position wholly inconsistent with precedent, and what they seek from this Court is a radical revision of the law. Moreover, the case upon which they rely, *United States v. McNinch*, 356 U.S. 595 (1958), is obviously reconcilable on the basis that an application for insurance coverage, false or not, is not a *claim for payment*. Whether the result would be the same today, given the "uses . . . a false record to get a . . . claim paid or approved" language of 31 U.S.C. § 3729(a)(2), is to say the least an open question.

an inflated request for payment." *Br. Pet.* at 39. According to Petitioner, "[t]o establish liability under the FCA, the Government (or a qui tam relator) must at the very least allege and prove that a particular transgression resulted in an excessive demand for Government money." *Id.*

If Petitioner means that the False Claims Act is offended only where there is an overbilling, that assertion flies in the face of years of judicial teaching—most notably, that of *Rex Trailer*— as well as the intent of Congress when it enacted the 1986 amendments.[6] Petitioner's interpretation also is unsupported by the plain language of the False Claims Act. It proscribes knowing submission, or knowingly *causing* submission, to the Government of a false or fraudulent claim for Government payment or approval. 31 U.S.C. § 3729(a).[7] Whether that demand is "excessive" is immaterial: What matters is its *falsity*.

As Petitioner notes, "not every false statement gives rise to a false claim" (*id., citing Hubbard v. United States*, ___ U.S. ___, ___, 115 S. Ct. 1754, 1760 (1995). That

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[6] "The cost of fraud cannot always be measured in dollars and cents . . . . Even in the cases where there is no dollar loss . . . the integrity of quality requirements in procurement programs is seriously undermined." S. Rep. at 3, *reprinted in* 1986 U.S. Code Cong. & Admin. News at 5268.

[7] There actually are seven categories of prohibited acts, enumerated in 31 U.S.C. § 3729(a)(1)—(7). These range from submission of false claims for payment, to creating or using a false record to get a false claim paid, to conspiring to get a false claim paid, to knowingly making or using a false record to conceal, avoid, or decrease an obligation to make payment to the Government. *Id.*

bland assertion does not significantly advance Petitioner's position. What Petitioner omits from the mix is that any materially false statement submitted in connection with a claim for payment makes the claim for payment itself false. For example, *United States ex rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196, 199 (D.C. Cir. 1995) held that submission of progress reports falsely certifying that computer software worked (when it did not) were—although they were not themselves invoices—"false statements in support of false claims and would trigger the Act's civil penalty."

Petitioner also suggests that interpreting the False Claims Act to cover anything other than "an excessive demand for Government money" would "subsume the False Statements Act, 18 U.S.C. §1001." Br. Pet. at 39. This suggestion, repeated by the Medical *amici* (*Br. Med. Amici* at 29), is unpersuasive. At the threshold, it is Petitioner and its *amici* who are urging this Court not only to abandon 50 years of judicial precedent, but to ignore the clear adoption by Congress of that precedent. The making of a false claim for payment is an element of a claim under the False Claims Act. The same conduct might also support a criminal conviction under 18 U.S.C. § 1001 *(e.g., United States v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988)). However, the suggestion of the Medical *amici* that use of the False Claims Act to recoup taxpayer expenditures toward the investigation of false claims which do not cause excess contract payments turns it into a "civil False Statements Act" is neither here nor there: The simple fact is that it has long been recognized that "proof of actual damage is not a prerequisite to the recovery of a forfeiture under the False Claims Act .... [T]he investigation necessary to detect a false claim costs the Government money even if no money

is paid on the claim." *United States v. Ridglea State Bank*, 357 F.2d 495 (5th Cir.1966). *Accord, Thevenot v. National Flood Insurance Program*, 620 F.Supp. 391, 396 (W.D. La. 1985).

Simply stated, this proposition is neither doubtful nor offensive: If one makes false claims to the United States, or causes another to do so, the costs to the taxpayers of the investigation of those false claims should, if Congress so legislates, be borne by the party which caused them to be incurred.[8] Indeed, that concept is firmly embedded in *Halper*, 490 U.S. 435. When contractors choose to ignore the requirements of their contracts, both the drain on Government resources and the harm to the integrity of the Government contracting system are real—whether or not the Government is overbilled.

The Medical *amici* go to great lengths to demonstrate that the Government did, indeed, suffer damages in *Rex Trailer*. *Br. Med. Amici* at 24-25, 27. They assert that such damages included "proprietary harm when the

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[8] The suggestion by *amici* that permitting an action for civil penalties to proceed where there are no damages other than the cost of investigation would "convert the FCA into a civil False Statements Act designed to fund Federal auditors" (*Br. Med. Amici* at 29) is a *non sequitur*. Why should the public fisc, upon which Petitioner and its *amici* gaze so fixedly, bear the expense of investigating the extent to which false statements by a Government contractor have damaged that fisc? It is, in this context, obvious that there is substantial wisdom to the test being not whether or not the false claims caused actual damage, but whether they satisfy the elements established by Congress in §3729(a). If they did, it is entirely fair and appropriate to require the contractor to answer for its conduct.

defendants swindled it out of the trucks" earmarked for veterans, and quote this Court's observation that the Government was injured by way of depletion of the supply of trucks available to Government agencies. *Br. Med. Amici* at 25. To be sure, this Court did indeed observe that even though the Government could not prove monetary damage against Rex Trailer, its goals were thwarted and it may have had less trucks for itself (not, however, a point which was in the record).

The *amici* would have done well not to make this argument, for it demonstrates precisely the negative of the proposition they wish to prove. If they would have the Court believe that there were, in fact, "actual," hard-dollar damages in *Rex Trailer*, their analysis is patently revisionist: The very issue before the *Rex Trailer* Court was whether a complaint which failed to allege actual damage stated a claim upon which relief could be granted. 350 U.S. at 152. The Court found that it did-– that "the fact that no damages are shown is not fatal." *Id.* at 153. While the *amici* strive to discount this as mere *dictum*, this suggestion is sharply at variance with the fact that the Government neither alleged nor proved damages: The fact is, *Rex Trailer* squarely supports the proposition that injury to Government programs and policies is precisely within the sphere of damage remedied by imposition of civil-penalty remedies.

Many courts—including this one—have recognized that the civil-penalty provision in the Act works to permit the Government to recoup *all* its losses in a case of false claims for payment by, or occasioned by, a contractor or its subcontractor– even where those false claims did not cause the Government to pay out money. What the Court actually reasoned in *Rex Trailer* was that incalculable

damage to the United States—the thwarting of the Surplus Property Act's purpose by "preclud[ing] bona fide sales to veterans, decreas[ing] the number of motor vehicles available to Government agencies, and tend[ing] to promote undesirable speculation" (*id.* at 153)—was sufficient to justify imposition of civil penalties upon the defendant. These "damages" were obviously incalculable, and assuredly did not cause, in any legal sense, a loss of money—calculable or incalculable—to the United States.

The costs identified by *Rex Trailer* have proven important to other courts considering whether damages need not result from a false claim for it to be actionable. For example, in *Ab-Tech Construction,* 31 Fed. Cl. 429, a contractor falsely certified its compliance with the Small Business Administration's minority-owned business program established by Congress in Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a). The Government had brought suit under the False Claims Act, but offered "no proof . . . to show that [it] suffered any detriment to its contract interest" as a consequence of the fraud. *Id.* at 434. "Rather, viewed strictly as a capital investment, the Government got essentially what it paid for[.]" *Id.* The court therefore concluded that the Government had sustained no actual damages, but permitted recovery of civil penalties under the FCA. *Id.* at 435.

Noting this Court's reference in a closely-related context to the compensable nature of the "'costs of corruption'" (*Ab-Tech*, 31 Fed. Cl. at 435, *quoting Halper*, 490 U.S. at 450), the *Ab-Tech* court held as follows:

> In this case, such costs would include the added administrative burdens imposed on the Corps of Engineers and the SBA in their respective inquiries into the nature of the business relationship between Ab-Tech and [its subcontractor]; the expense of the criminal investigation undertaken by the Department of Defense Inspector General; the expenses associated with the grand jury's investigation and the ensuing criminal trial; and most significantly, the societal cost associated with Ab-Tech's abuse of the section 8(a) program.

Ab-Tech, 31 Ct. Cl. at 435.

Here, Petitioner and its *amici* flatly refuse to acknowledge the damaging—and compensable—nature of these injuries. They also refuse to acknowledge, as is the clear import of *Rex Trailer*, that Congress had both the *intent* and the *authority* to create a statutory cause of action which allows recovery of amounts intended to compensate for such injuries without proof of "actual" loss.

The losses identified in, *e.g.*, *Rex Trailer* and *Ab-Tech* are costly insults to the sovereign caused by the taking of improper (in the truest sense, "undue") advantage of it by those who wish to participate in the sovereign's programs, or who choose, with their own profit in mind, to solicit the sovereign's business. Petitioner apparently would ask this Court either to reject those holdings, and the many others like them, or conclude that they are qualitatively different than the damage caused the Government by the diversion of investigative resources and the damage to the integrity of the contracting process caused by a contractor who, in jet-fighter development programs worth hundreds of millions (or billions) of dollars, elects not to comply with the precise terms of its contract.

While the Medical *amici* express dismay at the suggestion that this case might proceed "[w]hen the *only* concrete harm that Schumer can allege is the cost of the same Government investigation which prompted the Government to withdraw its finding of noncompliance" (*Br. Med.* Amici at 29), that proposition, viewed in the context of 31 U.S.C. § 3729(a)(1), is unexceptional. What is significant is the fact that there are triable issues of fact whether Petitioner filed (or caused its prime contractor to file) false claims for payment. If it did, then the fact that a complex and protracted investigation eventually determined that Petitioner had not cost the Government money *in addition* to the expense of the investigation caused by the conduct underlying the false claims is simply irrelevant to the question whether a cause of action has been stated.[9]

This Court should reject in their entirely the arguments of Petitioner and its *amici* on both the question whether "actual damages" are an essential element of an action under the FCA, and the related question whether a "threat to the public fisc" is an element of such a cause of action. Long-standing precedent both establishes the contrary principle and serves well the national interest in ferreting out fraud.

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[9] Simply put, the public fisc *is* "implicated" when tens or hundreds of thousands of taxpayer dollars must be spent to determine the impact of contractual noncompliance by Government contractors, and limited investigative resources must be diverted from other matters.

III. PETITIONER'S ACCOUNTING IRREGULARITIES WERE NOT "PUBLICLY DISCLOSED," AND SO THE JURISDICTIONAL BAR WAS NOT TRIGGERED

The 1986 amendments to the FCA were intended by Congress to "encourage more private enforcement suits." S. Rep. at 2, *reprinted in* 1986 U.S. Code Cong. & Ad. News at 5266. This result was desired because the Government was being overwhelmed by fraud on the part of its contractors.[10] Indeed, Petitioner itself has recently

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[10] As one treatise has summarized the situation found by Congress:

> [I]n 1985, four of the largest defense contractors (General Electric, GTE, Rockwell and Gould) had been convicted of criminal fraud offenses within the last year. Another of the largest defense contractors, General Dynamics, had been indicted in a massive fraud scheme. And 45 of the largest 100 defense contractors remained under investigation for multiple fraud offenses. In the 1980s, fraud against the Government was on a steady rise. Department of Defense fraud investigations rose 30% between 1982 and 1984. Furthermore, the fraud was not limited to defense contractors. During the years 1983 through 1986, the Department of Health and Human Services tripled its prosecution referrals for fraud. Also, during a two-and-a-half-year period, the United States General Accounting Office (GAO) identified over 77,000 fraud cases in 21 different agencies.

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been convicted of conspiracy to defraud the United States in its role as a defense contractor, and for making false statements to the Government. *United States v. Hughes Aircraft Co., Inc.*, 20 F.3d 974 (9th Cir. 1994) (affirming conviction).

The amended FCA encourages anyone with knowledge of false claims on the part of Government contractors to bring a *qui tam* action. There are only limited exceptions to this, including, primarily, the public-disclosure provision at issue in this case. That provision, 31 U.S.C. § 3730(e)(4)(A), provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Thus, the statute deprives courts of jurisdiction over *qui tam* actions brought by persons who do not qualify as original sources[11] where the case is *(a)* "based upon" *(b)*

Whistleblower Litigation 34-35 (Michie 1994) (footnotes omitted).

[11] 31 U.S.C. §(e)(4)(B) provides:

> For purposes of this paragraph, "original source" means an individual who has direct

"public disclosure" of *(c)* "allegations or transactions" *(d)* in *(1)* "a criminal, civil or administrative hearing; *(2)* "a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation; or *(3)* "from the news media."[12]

A. THE COURT OF APPEALS CORRECTLY HELD THAT THERE WAS NO PUBLIC DISCLOSURE IN THIS CASE

There appears to be no dispute that the purpose of the "public disclosure" rule and the "original source" exception is to encourage *qui tam* actions to combat wide-spread fraud while rejecting cases derived solely from certain prior public disclosures of that fraud. *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347 (4th Cir.), *cert. denied*, 115 S.Ct. 316 (1994); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992).

> and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

[12] The logical construction of this statutory list is that "the methods of 'public disclosure' set forth in section 3730(e)(4)(A) are exclusive of the types of public disclosure that would defeat jurisdiction under that section." *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499 (11th Cir. 1991). However, because this case involves disclosures contained in an "administrative . . . report, audit, or investigation," this Court need not determine if the statutory enumeration is exclusive.

Petitioner asserts that there was a "public disclosure" of the allegations upon which Mr. Schumer brought suit because the Petitioner's cost-accounting noncompliance was the subject of audit reports which were available to a limited number of employees of Petitioner and its prime contractor, Northrop. They therefore challenge the court of appeals' conclusion that "revelation of information to an employee" of the company alleged to be engaged in conduct which violates the FCA or other companies upon whom "disclosure of such allegations could reflect negatively" does not "trigger the potential for corrective action presented by other forms of disclosure" and so does not constitute "public disclosure" within the meaning of § 3730(e)(4)(A).

The Ninth Circuit's holding placed it in conflict with the Second Circuit's holding, in *United States ex rel Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992), that "[o]nce allegations of fraud are revealed to members of the public with no prior knowledge thereof, the Government can no longer throw a cloak of secrecy around the allegations." The *Doe* court, concluding that the questioning by Government investigators of "innocent employees of John Doe Corp." constituted "public disclosure," affirmed dismissal based upon the jurisdictional bar of § 3730(e)(4)(A).[13]

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[13] *Doe* arose in circumstances which the Second Circuit obviously found distasteful. The *qui tam* relator was an attorney who had represented Meyerson, a target in the Government's investigation of John Doe Corp. Meyerson did not wish to bring a *qui tam* case against John Doe Corp., so Attorney Doe brought the case himself. Attorney Doe asserted that Meyerson had waived any interest he might have had in such a case, but "steadfastly refused" to produce the alleged

So, this issue comes down to the meaning of the words "public disclosure." The *New Shorter Oxford English Dictionary* (Clarenden Press 1993) defines "public" first as being "[o]f or pertaining to the people as a whole; belonging to, affecting or concerning the community or nation." Subordinate definitions include such language as: "Open or available to, used or shared by, all members of a community; not restricted to private use." The same dictionary defines "disclosure" as "[t]he action or an act of making known or visible." *Id.* "Public disclosure," then, is "the action or an act of making known or visible" "to the people as a whole." This Court's preference for the plain meaning of words should lead it to conclude that public disclosure occurs only when essential "allegations or transactions" which give rise to a *qui tam* complaint are made known or visible to the people as a whole—that is, publicly available.[14]

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waiver to the United States. 960 F.2d at 320. The Second Circuit placed "[e]thical implications aside" (*id.* at 319), but its dismay over Attorney Doe's conduct is manifest.

[14] This simple, linguistically-honest approach to the problem of what constitutes a "public disclosure" has not escaped judicial notice. Two years after *Doe*, the D.C. Circuit held:

> The language employed in §3730(e)(4)(A) suggests that Congress sought to prohibit *qui tam* actions only when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain.

United States ex rel. Springfield Terminal Railway v. Quinn, 14 F.3d 645, 654-57 (D.C. Cir. 1994). And the Tenth Circuit

Here, the Ninth Circuit concluded that disclosure of a company's fraud to innocent employees of that corporation is not a "public disclosure." Petitioner and its *amici* are offended by the proposition that such employees are not, "members of the public." In fact, however, common usage of the phrase "public disclosure" references disclosure outside of an organization or group. Had Congress meant the phrase "public disclosure" to mean anything other than making available to the general public, it could have easily used the words "disclosure to any person." Under such language, "original sources" would

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recently held:

> Information to which the public has potential access, but which has not actually been released to the public, cannot be the basis of a parasitic lawsuit because the relator must base the *qui tam* suit on information gathered from his or her own investigation. If a specific report detailing instances of fraud is not affirmatively disclosed, but rather is simply ensconced in an obscure Government file, an opportunist *qui tam* plaintiff first would have to know of the report's existence in order to request access to it. With regard to such materials, which are at best 'only potentially in the public eye,' we agree with the District of Columbia Circuit that 'no rational purpose is served—and no 'parasitism' deterred—by preventing a *qui tam* plaintiff from bringing suit based on their contents.'

United States ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1520 (10th Cir. 1996), *quoting Quinn*, 14 F.3d at 653.

still be able to pursue *qui tam* cases, and the impact would have been precisely that achieved by *Doe* and urged by Petitioner— disclosure to anyone who is conceivably a member of "the public" would trigger the jurisdictional bar.

The Senate Report observes that "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity. Yet in the area of Government fraud, there appears to be a great unwillingness to expose illegalities." S. Rep. at 4, *reprinted in* 1986 U.S. Code Cong. & Ad. News at 5269. While the *Doe* majority implied that its analysis reflected application of a "practical, commonsense interpretation to 'public disclosure'" (*Doe*, 960 F.2d at 322, *quoting United States ex rel. Stinson v. Prudential Insurance Co.*, 944 F.2d 1149, 1161 (3d Cir. 1991), that assertion does not mesh with the reality understood by Congress.

In fact, what common sense actually teaches is that employees who are aware of problems at their workplace are unlikely to take steps they can be reasonably sure will place both their employer and their livelihood at risk. The highly-publicized stories of whistleblowers from Frank Serpico to Karen Silkwood to recent tobacco-industry defectors highlight for all to see the personal devastation which sometimes results from the taking public of damaging information about one's employer. That doing so will lead to ostracization, career stagnation, or job loss, is a commonplace.[15] Given these realities, the fact that

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[15] The fact that whistleblowers typically face personal and professional devastation is well-chronicled in Glazer, M. & Glazer, P., *The Whistle-Blowers: Exposing Corruption in*

Mr. Schumer's co-workers—or the "innocent" employees interviewed by Government investigators in *Doe*—were under no legal mandate to keep quiet regarding what they knew, is a scant basis for belief that the truth will out as soon as a "stranger to the fraud" knows something of a contractor's fraud.[16]

It is even more obvious that those who are perpetrating the fraud are the least likely to attempt to bring their employer's conduct before the public eye. Yet Petitioner argues that because those who are *not* "strangers to the fraud"—*a fortiori*, participants in the fraud—will remain free to bring *qui tam* actions against their employer, this Court should apply the most restrictive interpretation of "public disclosure" which creative lawyering can conceive.[17]

Government & Industry (Basic Books 1989).

[16] This is particularly true given the control which an employer—and especially a large employer—has over the flow of information to its employees, as well as the manner in which information is characterized. Secrecy in the world of defense contracting is very often mandated by law, and always encouraged; that, coupled with an employer's grip on the reins of an employee's livelihood, shows the dubious' nature of the conclusion that disclosure to a "stranger-to-the-fraud" employee is "public" disclosure.

[17] The Tenth Circuit recently came quite close to this zenith, holding that a *qui tam* relator who shows an audit report to a representative of the American Association of Retired Persons assisting him with an age-discrimination claim has made a "public disclosure." *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.2d 1000 (10th Cir. 1996). This leads to the conclusion that one who finds evidence of her

The plain language of the statute, requiring as it does "public disclosure," warrants affirmance on this issue. However, should the language be viewed as anything other than wholly clear, then the Court may "look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). As noted above, the purpose of the False Claims Act "as a whole" is to "encourage more private enforcement suits." It is the interest of Petitioner and each of its many *amici* to *discourage* more private enforcement suits. The result they now urge Is palpably antithetical to the intent of Congress in passing the 1986 amendments to the False Claims Act.

B. The Rule of Lenity Has No Application Here. The FCA is Remedial; Is Not Criminal; Is Constitutional; And, As To "Public Disclosure," Is Clear

By way of coda, we briefly address the peculiar contention of Petitioner's *amicus* Washington Legal Foundation that this Court apply the "rule of lenity" in interpreting the jurisdictional bar of § (e)(4). *Br. Amicus Wash. Legal Fdn.* at 22. This suggestion is patently specious.

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employer's fraudulent conduct cannot discuss it with a spouse, parent, sibling, or, presumably, pastor or priest, without having made a "public" disclosure thereof. The caprice of such a rule plainly goes against both the words of the statute and the public interests underlying the False Claims Act, and accomplishes naught but the dismissal of potentially-meritorious lawsuits on irrelevant grounds.

The False Claims Act is a civil, remedial statute. The FCA simply "afford[s] the Government complete indemnity for the injuries done." *United States ex rel. Marcus v. Hess*, 317 U.S. at 549. Throughout the proceedings leading to the 1986 amendments to the Act, Congress noted that the FCA is "a civil remedy designed to make the Government whole for fraud losses[.]" S. Rep. at 6, 1986 U.S. Code Cong. & Ad. News at 5271. The Senate Report cited the following excerpt from this Court's decision in *Hess*:

> [In] *United States v. Griswold*, 24 F. 361, 366 (D. Ore 1885) ... the [District] Court said: 'The statute is a remedial one. It is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly.'"

S. Rep. at 11, 1986 U.S. Code Cong. & Ad. News at 5276. The Report offers this additional observation:

> Inasmuch as False Claims Act proceedings are civil and remedial in nature and are brought to recover compensatory damages, the Committee believes that the appropriate burden of proof devolving upon the United States in a civil False Claims Act suit is by a preponderance of the evidence.

S. Rep. at 31, 1986 U.S. Code Cong. & Ad. News at 5296. Given the remedial nature of the FCA, the *amici's* suggestion that the Court mandate a "restrictive interpretation of the 'public disclosure' bar" (*Br. Wash. Legal Fdn.* at 18) makes no sense: Remedial statutes are construed broadly

to effectuate their purposes.

The rule of lenity has no place in the interpretation of civil, remedial statutes. It is "rooted in the . . . belief that fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property[.]" *Huddleston v. United States*, 415 U.S. 814, 831 (1974).

Moreover, the suggestion of the *amicus* that the "dubious constitutionality" of the FCA's *qui tam* provisions makes the rule of lenity applicable does no more than highlight the elaborate lengths necessary to make sense of the theory of Petitioner and its *amici* regarding what constitutes "public disclosure"—a tacit concession that the plain language of the law provides them no comfort. The fact is, the constitutionality of the *qui tam* provisions of the FCA is "questionable" only to Petitioner's *amicus*. Each court confronted with constitutional challenges to it has rejected them.[18]

Finally, the rule of lenity applies only where there is statutory ambiguity. *United States v. Yermian*, 468 U.S. 63, 75 (1984). While Petitioner and its *amici* go to considerable lengths to justify their tortured construction of the words "public disclosure," those two words simply do not carry with them the ambiguity which would lead this

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[18] *E.g.*, *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 127 L.Ed.2d 433 (1994); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 125 L.Ed.2d 663 (1993); *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456 (5th Cir. 1977).

Court to utilize the rule of lenity, even were the FCA a criminal statute.

If any goal other than reducing the number of *qui tam* lawsuits is served by the "any member of the public, including stranger-to-the-fraud employees of the perpetrator" rule which Petitioner and its *amici* urge, they have failed to identify it. This Court should give full voice to the intent of Congress, which is in direct opposition to that of Petitioner, and declare that "public disclosure" means neither more nor less than "making known or visible" "to the people as a whole"— general public availability. That is what the statute says, and that is entirely consistent with the Congressional purposes expressed in the 1986 amendments to the False Claims Act.

CONCLUSION

With respect to both the actual-damages and the public-disclosure issues raised by Petitioner, the judgment below should be affirmed.

Dated: January 3, 1997

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Supreme Court of the United States

OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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INTEREST OF *AMICUS CURIAE*

The National Health Law Program ("NHeLP") is a national public interest firm that seeks to improve health care for America's working and unemployed poor, minorities, elderly and people with disabilities. NHeLP serves legal services programs, protection and advocacy offices, community-based organizations, the private bar, providers, and individuals who work to maintain a health care safety net for the millions of uninsured or underinsured low-income people. NHeLP monitors Medicare, Medicaid and other publicly-funded health care programs, seeks remedies when laws and policies are ignored, and helps Americans receive needed medical care.

NHeLP has an interest in preserving the integrity of Medicare, Medicaid and other Government-funded health care programs.

Medicare is the nation's largest single payer of health care costs. In 1994, Medicare spent $162 billion, or 14 percent of the federal budget, on behalf of about 37 million elderly and disabled Americans. About 90 percent of Medicare beneficiaries obtain services on an unrestricted fee-for-services basis. Patients choose their own physicians or other health care providers, and the resulting charges are sent to the program for payment. The Health Care Financing Administration ("HCFA") within the Department of Health and Human Services is Medicare's health care buyer. HCFA contracts with private companies across the country like Blue Cross and Blue Shield, Aetna and Travelers to process and pay Medicare claims.[1]

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[1] U.S. Gen. Acct. Off., *Medicare: Modern Management Strategies Could Curb Fraud, Waste and Abuse* 1-2 (GAO/T-HEHS-95-227, 1995).

Medicaid is the nation's major publicly-financed health and long-term care insurance program for low-income Americans. Medicaid is cooperatively funded and administered by Federal and State Governments. In fiscal year 1995, Medicaid provided health care coverage for about 40 million low-income people. Over the past 10 years, Medicaid expenditures have more than tripled to $159 billion.[2] In response to budgetary pressures, increasing numbers of Medicaid recipients have been required to enroll in "managed" health care benefits plans.[3] The decided trend in these managed care arrangements is for Medicaid to pay health care plans a preset amount and expect the plan to provide the Medicaid services that are needed by the recipients.

Both Medicare and Medicaid are susceptible to widespread fraud by insurers, physicians, hospitals, and other members of the health care industry. The effects of this fraud ripple through the health care system:

> When federal programs are exploited and abused, it not only costs the taxpayers more, but also may diminish public support for programs, deprive eligible beneficiaries of benefits, and lower the level of services provided.[4]

The loss of hundreds of millions of dollars annually as a result of false and fraudulent billing of Government by health

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[2] U.S. Gen. Acct. Off., *Medicaid: States' Efforts to Educate and Enroll Beneficiaries in Managed Care* 3 (GAO/HEHS-96-184, 1996).

[3] *Id.* at 1 (As of June 1995, 11.6 million Medicaid beneficiaries--32 percent of all Medicaid beneficiaries--were enrolled in managed care plans.).

[4] U.S. Gen. Acct. Off., *Federal Agencies Can, and Should, Do More to Combat Fraud in Government Programs* 11 (GAO/GGD-78-62, 1978).

care providers and contractors threatens both the financial viability of these Government-funded health care programs and the quality of medical services, and thus places at risk those Americans who rely on Medicare or Medicaid for their health insurance and medical needs.

The False Claims Act has proven to be an effective tool in ferreting out false and fraudulent billing practices in the health care industry and in enabling the Government to recover significant dollars whose loss would ultimately be borne by the American taxpayer.

Although the facts in this case involve defense procurement fraud, this Court's decision could have implications in other areas of government contracting, including the health care industry.[5] NHeLP's *amicus curiae* brief explains how the amended FCA and its *qui tam* provisions serve as an effective

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[5] Indeed, the Brief for *Amici Curiae* "Healthcare Associations" suggests that if this Court interprets the "public disclosure" issue broadly as requested by Petitioner, then a hospital might be able to prevent its employee from becoming a *qui tam* relator if the employee learns about fraudulent claims from an audit performed at the Government's direction. *See* Brief for *Amici Curiae* The Association Of American Medical Colleges, The American Hospital Association, And The American Medical Association In Support Of Petitioner, at 4-5, 19-20. The Healthcare Association's interpretation of the "public disclosure" bar would turn that jurisdictional bar on its head because virtually all audits, reports and other self-monitoring of claims under Medicare, Medicaid and other Government-sponsored health care programs are required by or done at the request of the Government. The practical effect of the Healthcare Association's broad interpretation of the "public disclosure" bar would be to leave health care providers and contractors to police themselves regarding the submission of claims to the Government. Such a situation would be tantamount to leaving the fox to guard the hen house.

means to eliminate the fraud that permeates Medicare,[6] Medicaid[7] and other Government-funded health care programs.

In recognition of NHeLP's interest in this case, the parties have consented to the filing of this brief.[8]

SUMMARY OF THE ARGUMENT

The False Claims Act, with its *qui tam* provisions, is an effective litigation tool that is essential to our nation's fight against the unlawful submission of false or fraudulent claims to the Government by, among others, health care providers and contractors.

At the time the Act was amended in 1986, procurement fraud in the defense industry was pervasive. As the Act succeeded in combating at least some of the excesses of defense

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[6] False or fraudulent claims to the Government under the Medicare program are remedied under the FCA. *See* S. Rep. No. 345, 99th Cong., 2d Sess. 21, *reprinted in* 1986 U.S.C.C.A.N. 5200 [hereinafter Senate Report] ("false Medicare claims have been uniformly held to be within the ambit of the False Claims Act, though the claims were actually filed with and paid by insurance companies") (citing with approval *Peterson v. Weinberger*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975)).

[7] Although federal involvement in Medicaid is less direct than Medicare, claims submitted to state agencies under Medicaid are subject to civil enforcement actions under the FCA. *See* Senate Report, *supra*, at 22 (citing with approval *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144 (S.D. Cal. 1976)). For background information on the rise of fraud and abuse in Medicaid, *see* Paul Jesilow *et al.*, *Prescription For Profit: How Doctors Defraud Medicaid* (1993).

[8] Letters of consent from both parties have been filed with the Clerk of the Court.

procurement fraud, the focus of civil enforcement actions by the Government and *qui tam* relators by the mid 1990's shifted from the defense industry to the health care industry.[9]

False and fraudulent billing of Government by health care providers and contractors has reached epidemic proportions. Although the Government pays nearly one trillion dollars annually for health care, including its funding of programs such as Medicare and Medicaid, it has few, if any, effective institutional controls to detect false and fraudulent claims.[10] Similarly, States lack resources and regulations to police health care fraud.[11]

The False Claims Act and its *qui tam* provisions are needed to effectively detect and prosecute the rampant false and fraudulent billing of Government by health care providers and contractors. Every citizen has an interest in remedying and deterring the submission of false or fraudulent claims to the Government because each of us pays in one way or another for tax dollars that are paid to health care providers and contractors.

Fighting fraud does more than simply uphold the integrity of the public fisc. It also has tangible, positive effects on the everyday lives of the beneficiaries of Government programs such as Medicare and Medicaid. Recovering funds unlawfully

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[9] *See* Dep't. of Justice, *Justice Department Recovers Over $1 Billion in Qui Tam Awards And Settlements* (DOJ 95-542, Oct. 18, 1995).

[10] *See infra* notes 22-26 and accompanying text.

[11] *See* U.S. Gen. Acct. Off., *Health Insurance Regulation: Wide Variation in States' Authority, Oversight, and Resources* 6-7 (GAO/HRD-94-26, 1993); *infra* note 26.

taken from these programs enables more Americans to receive health insurance coverage and medically necessary services.

The United States Court of Appeals for the Ninth Circuit correctly ruled that damage to the public fisc is not an essential element of a *qui tam* action under the FCA.[12]

Accordingly, this Court should affirm the judgment of the Court of Appeals.

ARGUMENT

A. Congress Intended The 1986 Amendments To The FCA To Strengthen The Rights Of Citizens To Report And Prosecute False and Fraudulent Claims To The Government

1. Fraud Against The Government Was A Serious Problem Before The 1986 Amendments To The FCA

In 1981, the United States General Accounting Office produced a three volume Report to Congress entitled *Fraud In Government Programs: How Extensive Is It? How Can It Be Controlled?*[13] The Report concluded: "Fraud against Government programs is widespread. It undermines the integrity of Federal programs and makes people lose confidence

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[12] The "Argument" Section of this brief does not address the retroactivity and public disclosure issues.

[13] U.S. Gen. Acct. Off., *Fraud in Government Programs: How Extensive Is It? How Can It Be Controlled?* (GAO/AFMD-81-57; GAO/AFMD-81-73; GAO-AFMD-82-3, 1981) [hereinafter Report or GAO Report I, II or III].

in public institutions." GAO Report I, *supra*, at cover sheet. Among those identified as responsible for the fraud were federal contractors and grantee employees. *Id.* at 7. False statements were second only to theft as the largest type of fraud identified by the GAO Report. GAO Report II, *supra*, at 2.

The study found that nearly all false statement cases related to five agencies: the Social Security Administration, the Department of Defense, the Veterans Administration, the Department of Agriculture, and the Department of Housing and Urban Development.[14] *Id.* at 3. The Report noted that fraud permeated Government programs. *Id.* at 8-15 (citing a range of fraud against Government involving welfare and food stamps benefits, defense procurement, crop subsidies and disaster relief).

The GAO Report explained that the total cost of fraud could never be known because so much fraud goes undetected. GAO Report I, *supra*, at 4-5.[15] The GAO Report stated that "[t]he sad truth is that crime against the Government often does pay." *Id.* at cover page. Unlike violent crime, where the evidence of illegal conduct is shockingly apparent, fraud is much more subtle. It is concealed by lies and often is cloaked in the legitimacy of an on-going corporate or public concern. *See* Richard A. Posner, *Economic Analysis of Law* 221 (1992).

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[14] Notable by its absence at the time was the Department of Health and Human Services, which oversees the Medicare and Medicaid programs. As explained on pp. 12-22, *infra*, since the early 1990s, the health care industry has increasingly become the focus of enforcement actions under the FCA.

[15] *See also* Senate Report, *supra*, at 2.

Although the exact dollar cost of false and fraudulent claims to the Government could not be calculated with certainty, the United States Department of Justice estimated in 1981 that "fraud [w]as draining 1 to 10 percent of the entire Federal budget." Senate Report, *supra*, at 3. Such a projection meant at the time that "fraud against the Government could be costing taxpayers anywhere from $10 [billion] to $100 billion annually." *Id.*

Before the 1986 Amendments to the FCA, fraud in Government-funded programs often went undetected or unremedied because the Government itself suffered from bureaucratic gridlock and insufficient resources; and because the citizenry was not effectively empowered to compel the Government to take remedial action. Congress observed at the time that:

> [T]here are serious roadblocks to [the Government] obtaining information as well as weaknesses in both investigative and litigative tools. . . . Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity. Yet in the area of Government fraud, there appears to be a great unwillingness to expose illegalities. . . . [T]he collection of information which leads to successful fraud recoveries is hampered by Government's inadequate investigative tools.

Senate Report, *supra*, at 4-6; *accord* H.R. Rep. No. 660, 99th Cong., 2d Sess. 18 (1986) [hereinafter House Report] ("GAO found that due to weak internal controls and the fact that Government auditors do not pay adequate attention to possible fraud, many fraud cases have gone undetected.").

2. Congress Responded To Rampant And Unremedied Fraud Against The Government By Amending And Strengthening The FCA And Its *Qui Tam* Provisions

In 1986, Congress amended the FCA, including its *qui tam* provisions, to improve the effectiveness of Government and its citizens to prosecute false and fraudulent claims to the Government. Senate Report, *supra*, at 1.

The *qui tam* amendments eliminated the overly restrictive jurisdictional bar preventing *qui tam* lawsuits about which the Government possessed certain information, 31 U.S.C. § 3730; entitled successful *qui tam* relators to at least 15% and up to 30% of the funds they help recover from the defendant, *id.* § 3730(d); required the defendant to pay for the successful relator's reasonable costs of suit and attorney's fees, *id.*; permitted relators to maintain their status as parties to the FCA case even if the Government intervened in the case, *id.* § 3730(c); and established protections from employer retaliation for employee whistleblowers. *Id.* § 3730(h).

The effects of these changes were threefold. First, they removed the key barriers that had previously prevented citizens from filing *qui tam* suits against wrongdoers.[16] Second, they affirmatively encouraged people with knowledge of FCA violations to come forward to vindicate the Government's

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[16] *See* Senate Report, *supra*, at 25-26 (giving *qui tam* plaintiffs a more direct role in the litigation serves as a check that the government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reason); *id.* at 24 ("[M]uch of the purpose of the *qui tam* actions would be defeated unless the private individual is able to advance the case to litigation.").

rights.[17] And third, as a result, they increased the deterrent effect of the Act.

A "rational" wrongdoer contemplating whether to commit fraud weighs the potential payoff from fraud against the likelihood and consequences of being caught.[18] The revitalized *qui tam* provisions are available to any of the "rational" wrongdoer's peers, co-workers or others who know of the unlawful conduct and want to right it. The incentives for these people to right the wrong have been sufficiently strengthened by the 1986 Amendments, thus increasing the likelihood that a wrongdoer will be caught. In addition, the 1986 Amendments to the Act increased the potential loss to a wrongdoer from being caught by exacting treble damages and requiring the wrongdoer to pay the relator's fair costs and attorneys' fees. For the "rational" wrongdoer, the potential payoff from fraud is more likely to be outweighed by the higher likelihood of being caught

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[17] *See* House Report, *supra*, at 23 ("The purpose of the *qui tam* provisions of the False Claims Act is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward.").

[18] *See generally* Robert Cooter & Thomas Ulen, *Law and Economics* 506-32 (1988). Judge Posner, in his book *Economic Analysis of Law*, writes:

> A growing empirical literature on crime has shown that criminals respond to changes in opportunity costs, in the probability of apprehension, in the severity of punishment, and in other relevant variables as if they were indeed the rational calculators of the economic model. . . .

Richard A. Posner, *Economic Analysis of Law*, 223-24 (1992).

and the larger potential loss from being found liable. Thus, under conventional economic theory, the rejuvenated *qui tam* provisions make it less likely that a "rational" wrongdoer will commit fraud. It was Congress' intent that its 1986 Amendments have this effect, *cf.* Senate Report, *supra*, at 2, 8, and the courts should enforce the statute consistent with the remedial purpose of the Act.

3. The Amended FCA And Its Revitalized *Qui Tam* Provisions Have Proven Effective In Fighting Fraud By Those Who Contract With Or Bill The Government

One way to measure the effectiveness of the 1986 Amendments is to compare the number of FCA *qui tam* cases filed and the total dollars recovered in those cases prior to and after the Amendments.

Although information on the subject is limited, one study reports, based on Justice Department records, that between 1943 and 1986, there were only three *qui tam* cases filed under the FCA with total recoveries of $54,000.[19] According to another source, *qui tam* lawsuits numbered six or fewer annually prior to 1986.[20]

Since the 1986 Amendments to the Act, the Government has recovered over three *billion* dollars in civil fraud actions,

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[19] William Stringer, Kalorama Consulting Group, Inc., *The 1986 False Claims Act Amendments: An Assessment Of Economic Impact* 23 (1996).

[20] Paul Reidinger, *Fraud Doctors*, ABA Journal 49, 52 (May 1996).

and more than one *billion* dollars of those recoveries are attributed to 153 *qui tam* cases.[21]

False and fraudulent billing of Government has been going on at least since President Lincoln's time. *See* Senate Report, *supra*, at 8. Yet, only since Congress amended the FCA and its *qui tam* provisions in 1986 has Government, with the substantial assistance of an empowered and proactive citizenry, been able to effectively prosecute and deter billing fraud in any sustained, meaningful and measurable way.

B. The FCA And Its Revitalized *Qui Tam* Provisions Are Needed To Fight False And Fraudulent Claims To The Government In The Health Care Industry

1. The Health Care Industry Is Highly Susceptible To False And Fraudulent Claims To The Government By Health Care Providers And Contractors

The Government spends about one trillion annually on health care for its citizens.[22] Funding for Medicare and Medicaid accounts for many of those dollars.[23] However,

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[21] *See* Dep't. of Justice, *Justice Department Recovers Over $1 Billion In Qui Tam Awards And Settlements* (DOJ 95-542, Oct. 18, 1995).

[22] *See* Senator William S. Cohen, Investigative Report of Minority Staff of Senate Special Committee on Aging, *Gaming The Health Care System* 7 (July 7, 1994) [hereinafter Investigative Report].

[23] *See, e.g.*, U.S. Gen. Acct. Off., *Medicare: Rapid Spending Growth Calls for More Prudent Purchasing* 3-4 (GAO/T-HEHS-95-193, 1995). For fiscal year 1994, federal spending on Medicare totaled $162 billion, or $440 million per day. *Id.* at 1. In March 1995, the Congressional Budget Office

relatively few Government dollars are spent policing health care fraud and abuse. For example, less than one quarter of one percent of Medicare dollars is spent auditing payments by the Government.[24] Rather than increase the percentage of processed claims reviewed for billing fraud, HCFA has actually decreased the percentage from 20% in 1989 to 5% in 1994,[25] while the number of claims submitted for processing has gone up annually.[26]

Managed care is contributing to the Government's inability to effectively police health care fraud. Medicaid increasingly relies on capitated, risk-based managed health care plans to

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estimated that these expenditures would approach $350 billion by 2002, and exceed $460 billion by 2005. *Id.*

Controls placed on Medicare spending in one sector of the health care industry create pressure to increase spending in other sectors. For example, between 1992 and 1993, as diagnosis-related group cost containment measures limited Medicare reimbursements to hospitals for in-patient stays and treatment, there was a concomitant increase in Medicare spending for outpatient services, home health agencies and nursing homes. *See* U.S. Gen. Acct. Off., *Medicare: High Spending Growth Calls For Aggressive Action* 3 (GAO/T-HEHS-95-75, 1995).

[24] U.S. Gen. Acct. Off., *Medicare: Reducing Fraud And Abuse Can Save Billions* 5 (GAO/T-HEHS-95-157, 1995).

[25] *Id.* at 7.

[26] *Id.* at 3-5, 7.

The States are not better positioned than the Federal Government to fight health care fraud and abuse because the States are under-funded and lack sufficient experienced manpower to do the job. *See* U.S. Gen. Acct. Office, *Health Insurance Regulation: Wide Variation in States' Authority, Oversight, and Resources* 6-7 (GAO/HRD-94-26, 1993).

serve program beneficiaries. The managed care plans and their networks of providers are paid preset amounts of money per member per month, and they, in turn, agree to provide each Medicaid member with health care as called for in the Government contract and as needed by the patient. However, because the plans are being paid on a capitated basis, claims often are not submitted to the Government purchaser who might otherwise verify that a required service was in fact rendered. Thus, in the managed care context, the Government is losing access to encounter and claims data that it has traditionally relied on to police health care fraud and abuse.[27] While much of the movement toward managed care has focused on Medicaid, the Medicare program is increasingly using similar purchasing and delivery arrangements.

Rising health care spending by the Government and decreasing administrative surveillance for billing fraud enhances the opportunity and incentive for billing fraud and abuse by health care providers and contractors.

With so much Government money at stake in the health care industry, and so few institutional controls on how those dollars are spent, Government-funded health care programs have become highly susceptible to false and fraudulent billing. A 1992 Report by the General Accounting Office predicted that fraud and abuse would consume 10%, or about *$100 billion*, of the Government's *annual* health care expenditures.[28] A Senate Report two years later confirmed those figures and noted that

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[27] *E.g.*, Health Care Financing Admin., Dep't of Health and Human Services, *Integrating EPSDT and Managed Care* 6 (1996).

[28] U.S. Gen. Acct. Off., *Health Insurance: Vulnerable Payers Lose Billions to Fraud and Abuse* (GAO/HRD-92-69, 1992).

"[o]ver the last five years, estimated losses from these fraudulent [health care] activities totaled about $418 billion--or almost four times as much as the cost of the entire savings and loan crisis to date." Investigative Report, *supra*, at 1. That Report characterized health care fraud as "rampant," and warned that "[a]s our health care system moves toward a managed care model, opportunities for fraud and abuse will increase. . . ." *Id.* at 32.

Health care fraud and abuse has compromised the quality of and coverage for health care delivery for many Americans.[29] One Government study concluded:

> [P]atients--and, in the case of Medicare and Medicaid, taxpayers--pay a high price for health care fraud and abuse in the form of higher health care costs, higher premiums, and at times, serious risks to patients' health and safety.

Investigative Report, *supra*, at 1. For example:

* a home health care company billed Medicaid for millions of dollars of health care services by aides who were *un*trained and *un*qualified to provide those services;[30]

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[29] *See* U.S Gen. Acct. Off., *Federal Agencies Can, and Should, Do More to Combat Fraud in Government Programs* 11 (GAO/GGD-78-62, 1978) ("When federal programs are exploited and abused, it not only costs the taxpayers more, but also may diminish public support for programs, deprive eligible beneficiaries of benefits, and lower the level of services provided.").

[30] *See* Investigative Report, *supra*, at 2.

- 1500 employees lost prescription drug coverage because a pharmacist's fraudulent billing of Medicaid and a private insurer artificially inflated the cost of insurance to prohibitively expensive levels for their employer;[31]

- many nursing home patients and pharmacy customers unknowingly received ineffective samples or expired prescription drugs from a pharmacy that billed the Government for the drugs;[32]

- patients received expired or reused pacemakers, and mislabeled pacemakers intended for "animal use only," as part of a kickback scheme involving cardiologists, surgeons and a pacemaker salesman;[33] and

- a physician who examined patients with hypertension falsified their blood pressure readings and failed to treat their disease though he billed Medicaid hundreds of thousands of dollars for supposedly treating these and other patients suffering medical maladies.[34]

False and fraudulent billing in the health care industry manifests itself in many forms, including: overbilling; billing for

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31 *Id.*

32 *Id.*

33 *Id.* at 2, 16.

34 *Id.* at 22.

services not rendered; collecting capitation amounts but not providing the service called for in the managed care contract; "unbundling" (billing one item as many separate component parts); "upcoding" services to receive higher reimbursements; paying kickbacks and inducements for referrals of patients; falsifying claims and medical records to certify an individual for Government benefits; and billing for "ghost" patients or "phantom" services. Investigative Report, *supra*, at 1.

2. The *Qui Tam* Provisions Of The FCA, As Amended, Are An Effective Litigation Tool To Combat False And Fraudulent Claims To The Government By Health Care Providers And Contractors

The FCA and its *qui tam* provisions, as amended by Congress in 1986, already have proven effective in policing and prosecuting procurement fraud in the defense industry.[35] With fraud and abuse "rampant" in the health care industry,[36] the amended Act should likewise be an effective litigation tool for Government and its citizens to combat false and fraudulent claims to the Government by health care providers and contractors.

By all indications, the collaborative effort between the Government and its citizens to ferret out false and fraudulent claims in the health care industry is working. *Qui tam* lawsuits

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35 *See* statistics on successful procurement fraud prosecutions and recoveries under the amended FCA in Dep't of Justice, *Justice Department Recovers Over $1 Billion in Qui Tam Awards And Settlements* (DOJ 95-542, Oct. 18, 1995).

36 *See* Investigative Report, *supra*, at 32.

under the FCA have been responsible for the Government recovering:

- $3.1 million from a clinical laboratory which, over a five-year period, billed Medicare for local mileage charges for transporting specimens 5.7 million miles, equivalent to 230 trips around the earth;[37]

- $182 million from a laboratory testing company that billed Medicare for tests never performed;[38]

- Millions of dollars that hospitals or physicians collected based on improper referrals or forged Medicare claims;[39]

- Millions of dollars from medical equipment and drug companies that overbilled the Government or falsely represented to the Government the nature of the products or supplies being sold;[40]

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37 U.S. Gen. Acct. Off., *Medicare: High Spending Growth Calls for Aggressive Action* 6 (GAO/T-HEHS-95-75, 1995).

38 Office of Inspector General, Dep't. of Health & Human Services, *Laboratory Corporation of America to Pay $187 Million to Resolve Charges of False Claims to Government Programs* (Nov. 21, 1996) ($182 million civil liability plus $5 million criminal fine).

39 *See* Office of Inspector General, Dep't. of Defense, *Semi-Annual Report to the Congress* (Oct. 1, 1994 - Mar. 31, 1995).

40 Dep't. of Justice, *Medical Supplier Pays U.S. $4 Million To Settle Fraud Case* (DOJ 96-288, June 19, 1996); Dep't. of Justice, *Health Care Fraud Report FY 94* (1994); Rafael Alvarez, *Company Settles False Claims Case: Firm Accused Of Billing Medicare High Prices For Cheap Equipment,*

- $1.86 million from an ambulance service for dialysis patients who supposedly were confined to their beds but in fact could walk;[41]

- $39.8 million from a laboratory testing company that billed Medicare for tests that were not reasonable and necessary for the diagnosis or treatment of an illness or injury;[42]

- $40.35 million from insurers who mishandled or submitted improper or false billing to Medicare;[43] and

- Millions of dollars from physicians, home health operators, and nursing home facilities who falsely billed Medicaid for services not rendered or improperly performed.[44]

Baltimore Sun, Oct. 3, 1995, at 2B.

41 Dep't. of Justice, *Health Care Fraud Report FY 94.*

42 *United States ex rel. Dowden v. MetPath, Inc.*, No. 91-1843, 1993 WL 397770 (C.D. Cal. Sept. 13, 1993).

43 *United States ex rel. Flynn v. Blue Cross/Blue Shield of Michigan*, L93-1794, 1995 WL 71329 (D. Md. Jan. 10, 1995); *United States ex rel. Burr v. Blue Cross and Blue Shield of Florida, Inc.*, No. 91-134-Civ-J-16, 1992 WL 521775 (M.D. Fla. Aug. 4, 1993); Dep't. of Justice, *Health Care Fraud Report FY 94* (1994); *Massachusetts Insurer To Pay $2.75 Million To Settle Fraud Case*, Wall St. J., Sept. 29, 1994, at B12.

44 Dep't of Justice, *Albuquerque Psychiatrist, Hospital Settle With U.S. For $700,000* (DOJ 96-214, May 8, 1996); *Doctors Reach Settlement*, Washington Post, July 26, 1996, at B6; *$875,000 Settlement In False Claims Case*, N.Y.L.J., Dec. 26, 1995, at 2, *as corrected by* N.Y.L.J., Dec. 28, 1995, at 2; *HMO Settlement Should Encourage Others To Expose Medicaid Fraud,*

The foregoing examples are merely a small percentage of the false and fraudulent billing that plagues Medicare, Medicaid and other Government-funded health care programs.

The Government's recent recovery of $182 million from Laboratory Corporation of America ("LabCorp") illustrates how effective the FCA *qui tam* provisions can be in ferreting out false and fraudulent billing to the Government in the health care industry.[45] LabCorp marketed packages of blood tests for doctors who billed their patients directly at one price, and unbundled those packages and charged Medicare separately--and at a substantially higher price--for each test in the bundle, including some tests that routinely were not performed.[46] Because physicians never saw the LabCorp statements sent to third-party payers like Blue Cross and Blue Shield, they did not know about the false and fraudulent billing. The relator, a physician, used LabCorp for blood tests required for his practice. He noticed that LabCorp commonly did tests that he neither needed nor wanted for his patients and thus became suspicious of its billing practices. He reported his suspicions to the Government, and reportedly was told by one official not to concern himself with the problem because Medicare was paying the bills.[47] Ultimately, the doctor filed a *qui tam* complaint

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Sun Sentinel, Nov. 9, 1996, at 14A; *see generally* Investigative Report, *supra*, at 21-25.

45 *See supra* note 38 and accompanying text.

46 *See* Elyse Tanouye, *Laboratory Corp. Nears Accord In Medicare Case*, Wall St. J., Nov. 21, 1996, at A2.

47 *See Whistle-Blowers Get Cut Of Funds*, Greensboro News & Rec., Nov. 26, 1996, at B2; Richard McKay, *LabCorp Defends Settlement Over Billing*, Greensboro News & Rec., Nov. 23, 1996, at A1.

under the amended FCA and his action (and the lawsuits of three other relators)[48] forced the Government to take remedial action.

Remarkably, in 1992, LabCorp's predecessor, National Health Laboratories Corporation, paid the Government $111.4 million in a *qui tam* case after pleading guilty to submitting false and fraudulent claims for medical tests.[49]

The enormous amount of money that Government pays to health care providers and contractors has created a tremendous incentive not just for laboratory testing companies like LabCorp, but for insurance companies, physicians, durable medical equipment providers, hospitals and countless others in the health care industry, to risk filing false and fraudulent claims to the Government because of the potential lucrative financial return. That misguided economic opportunity and incentive will be deterred only by strong and certain economic and legal consequences.[50] The 1986 Amendments to the FCA provide the needed counterbalance.

The health care industry has become in the 1990s what the defense procurement industry was in the 1980s--an industry without conventional controls to police and prevent false and fraudulent claims to the Government, yet an industry that is pervasively dependent upon Government funding for its

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48 *See Whistle-Blowers Get Cut Of Funds*, Greensboro News & Rec., Nov. 26, 1996, at B2.

49 *See* Richard Turner, *National Health Labs Pleads Guilty To Fraud, Agrees To Pay $110 Million*, Wall St. J., Dec. 21, 1992, at A2.

50 *See supra* note 18 and accompanying text.

existence.[51] Just as the amended FCA, with its strengthened *qui tam* provisions, was essential to reigning in the billing abuses of defense contractors in the 1980s, so too is it necessary to controlling the fraudulent billing excesses of health care providers and contractors in the 1990s and beyond.

C. Consistent With The Remedial Purpose Of The 1986 Amendments, Injury To The Public Fisc Is Not An Essential Element Of A Cause Of Action Under The FCA

Injury to the public fisc is not an essential element of an action under the FCA. The Senate Report accompanying the 1986 FCA Amendments explains that "[t]he United States is entitled to recover [civil penalties] solely upon proof that false claims were made, *without proof of any damages*." Senate Report, *supra*, at 8 (italics added) (citing *Fleming v. United States*, 336 F.2d 475, 480 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965)).

In cases pre-dating the 1986 Amendments, this Court has consistently recognized that injury to the public fisc is not an essential element of an FCA claim. For example, in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), this Court affirmed a district court ruling that the Government's discovery of the fraud in time to withhold payment from the defendant did not bar a claim under the Act. Later, in *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956), this Court relied on its decision in *Hess* in holding that specific damages need not be

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[51] For example, federal funds pay for 41% of hospital care, 32% of nursing home care, and 28% of doctors' fees. *See* Bureau of the Census, *Statistical Abstract of the United States* 98 (tbl. 137) and 100 (tbl. 141) (1992).

demonstrated to recover under the Surplus Property Act. And in *United States v. Neifert-White Co.*, 390 U.S. 228 (1968), this Court stated that the FCA, which it characterized as a "remedial statute," *id.* at 233, "reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *Id.*

Nothing in the 1986 Amendments alters this precedent.

The submission of false or fraudulent claims to the Government by health care providers and contractors, even if not paid by the Government, erodes the integrity of Government-funded health care programs. *See, e.g.*, Senate Report, *supra*, at 3 ("Even in the cases where there is no dollar loss . . . the integrity of quality requirements in procurement programs is seriously undermined."). When the quality of these programs is undermined, the Government and its taxpayers ultimately bear the costs. *See* Investigative Report, *supra*, at 1; *supra* notes 4 & 29 and accompanying text.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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